TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER T[illegible] 1909.

292.

THE UNITED S[illegible]ES, PLAINTIFF IN ERROR,

vs.

TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS JOSEPH BELLAIRE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 14, 1908.

(21411)

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a District Court of the United States, District of Massachusetts.

THE UNITED STATES OF AMERICA, BY INDICTMENT,
versus
TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS Joseph Bellaine. } No. 143.

Writ of error.

ASA P. FRENCH, *United States attorney.*
PARKER & MILTON,
HERBERT PARKER,
Attorneys for defendants.

b *Writ of error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine (criminal docket case No. 143), a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the sixteenth day of November next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twentieth day of October, in the year of our Lord one thousand nine hundred and eight.

FRANK H. MASON,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

c *Return of District Court on writ of error.*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss.

And now, here, the judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States at Washington, D. C., as within commanded.

In testimony whereof I, Frank H. Mason, clerk of said District Court of the United States in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twelfth day of November, A. D. 1908.

[SEAL.] FRANK H. MASON, *Clerk.*

1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the second Tuesday (being the eighth day) of September, in the year of our Lord one thousand nine hundred and eight, before the Honorable Frederic Dodge, judge.

THE UNITED STATES OF AMERICA, BY INDICTMENT,
versus
TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS Joseph Bellaine. } No. 143.

The jurors for the United States of America, within and for the District of Massachusetts, upon their oath present that Tilden B. Stevenson and Amede Bellaire, otherwise known as Joseph Bellaine, both of Manchaug, in the District of Massachusetts, on the twelfth day of July, in the year of our Lord one thousand nine hundred and seven, at said Manchaug, did knowingly, wilfully, and unlawfully bring into the United States certain alien contract laborers not then and there lawfully entitled to enter the United States, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque, and Rosina L'Eveque, who on the day and date of said offence left the town of Riviere de Loup, in the Dominion of Canada, by train to come to the United States in pursuance of an offer theretofore made to them, the said alien contract laborers heretofore mentioned, by the said Amede Bellaire, otherwise known as aforesaid, to perform unskilled labor in the United States, they, the said alien contract laborers, or either of them, not being then and there professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for a

college or seminary, or persons belonging to any recognized learned profession, or persons employed strictly as personal or domes-
2 tic servants; all of which they, the said Stevenson and Bellaire, otherwise known as aforesaid, then and there well knew, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid, do further present that Tilden B. Stevenson and Amede Bellaire, otherwise known as Joseph Bellaine, both of Manchaug, in the District of Massachusetts, on the twelfth day of July, in the year of our Lord one thousand nine hundred and seven, at said Manchaug, did knowingly, wilfully, and unlawfully assist certain alien contract laborers, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque, and Rosina L'Eveque, to migrate from the town of Riviere de Loup, in the Dominion of Canada, to the United States, in pursuance of an offer made to them, the said alien contract laborers heretofore mentioned, by the said Amede Bellaire, otherwise known as aforesaid, to perform unskilled labor in the United States, they, the said alien contract laborers, or either of them, not being then and there professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for a college or seminary, or persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants; all of which they, the said Stevenson and Bellaire, otherwise known as aforesaid, then and there well knew, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

This indictment was found at the March term, A. D. 1908, of this court, and was continued to the June term, nineteen hundred and eight, when, on the thirteenth day of July, nineteen hundred and eight, the following demurrer of defendants was filed:

Demurrer of defendants.

And now come said defendants and severally and jointly file and present this their demurrer to the said indictment and the several counts thereof filed in said cause.

And said defendants so assign as cause and grounds of said
3 demurrer the following:

First. That the said indictment and the several counts thereof set forth and present no charge or allegation of any crime or offence against the United States, committed by either of said defendants, or so committed within the jurisdiction of this honorable court.

Second. That the said indictment and the several counts thereof set forth and present no charge of any crime or offence against the United States which can be, as matter of law, maintained or prose-

cated upon said indictment or within the criminal jurisdiction or procedure of this honorable court.

Wherefore, for want of sufficient and adequate allegations in said indictment and the several counts thereof and for want of jurisdiction of this court in the premises, the said defendants pray that the said indictment and the several counts thereof be quashed and annulled and that the defendants be discharged thereon and therefrom and that they be permitted to go hence without further answering to said indictment, or either count thereof.

TILDEN B. STEVENSON.
AMEDE BELLAIRE.

By their attorneys:

PARKER & MILTON.
HERBERT PARKER.

I hereby certify that, in my opinion, the matters of law raised and presented by the foregoing demurrer are of such importance as to be worthy of judicial inquiry and that the said demurrer is not filed merely for the purpose of delay.

HERBERT PARKER.

From said June term, nineteen hundred and eight, this cause was continued to this present September term. And now, on this twenty-first day of September, nineteen hundred and eight, the foregoing demurrer of defendants is sustained. It is thereupon ordered by the court that said indictment be quashed.

On the twentieth day of October, nineteen hundred and eight, the following bill of exceptions is filed by the United States
4 attorney for this district and allowed by the court.

Bill of exceptions.

Be it remembered that on the twenty-first day of September, A. D. 1908, the demurrer of the defendants, Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine, to the indictment in the above-entitled cause was sustained and said indictment quashed, and the United States thereupon duly excepted to the order of the court sustaining the demurrer and quashing said indictment, and its exceptions were duly allowed. A copy of the opinion of the court sustaining said demurrer is hereto annexed and made a part hereof, and the United States of America, by its attorney, Asa P. French, now presents this bill of exceptions to the court and prays that the same may be signed by the court and allowed and made a part of the record in this cause.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

Allowed October 20, 1908.

FREDERIC DODGE,
Judge U. S. District Court, Massachusetts.

(Copy.)

District Court of the United States, District of Massachusetts.

THE UNITED STATES OF AMERICA, BY INDICTMENT, *versus* TILDEN B. STEVENSON AND ANOTHER.	No. 143. Criminal docket. On demurrer to indictment.

Opinion (September 21, 1908).

DODGE, J. The first count of this indictment charges that the defendants, on July 12, 1907, at Manchaug, in this district, did knowingly, wilfully, and unlawfully bring into the United States certain alien contract laborers not lawfully entitled to enter the country, who, on the date stated, left Riviere du Loup, in Canada, by train to come into the United States in pursuance of an offer previously made to them to perform unskilled labor in the United States. The offence charged is claimed to be a violation of sec. 8 of the immigration act of February 20, 1907 (34 Stats., 898, 900).

Manchaug, as the court may properly know judicially, is in the town of Sutton, Massachusetts, and therefore many miles distant from any place at which it is possible to "enter" the United States from without, whether by railroad from Riviere du Loup or by any other route. While there may be difficulty in saying exactly what acts on the defendant's part would constitute the offence of "bringing into" the country an alien not lawfully entitled to enter it, it seems to me impossible that any acts of theirs done wholly at Manchaug could ever amount to a commission of that offence. I am therefore obliged to hold this count of the indictment bad for repugnancy.

The second count of the indictment charges that the defendants, on July 12, 1907, at Manchaug, "did knowingly, wilfully, and unlawfully assist" certain contract laborers to migrate from Riviere du Loup to the United States in pursuance of an offer made to them to perform unskilled labor in the United States; and the offense charged is claimed to be a violation of sec. 4 of the immigration act above cited. Assisting such migration is made a misdemeanor by the section referred to, but no fine or imprisonment is anywhere imposed upon the offender. The only liability he incurs is the liability to a penalty imposed by sec. 5, and the penalty there imposed is to be recovered, according to the same section, "as debts of like amount are now recovered in the courts of the United States." Such debts, it is clear, are not recoverable by indictment in the courts referred to; they are only recoverable by civil action. "Wherever a statute creates an offence and expressly provides a punishment, the statutory provisions must be followed strictly and exactly, and only the statutory penalty can be imposed." (Wharton, Criminal Law, 1 § 25.) This is an old and well settled rule. Instances of its recognition or

application in the construction of federal criminal statutes are: U. S. vs. Moore, 11 F. R., 248; U. S. vs. Howard, 17 F. R., 638; U. S. vs. Payne, 22 F. R., 426; U. S. vs. Craft, 43 F. R., 374. I think it applies here, and therefore hold that no indictment will hold for the offence charged, notwithstanding that the statute has made it a misdemeanor, so far as that can be done by mere description.

6 A further reason for sustaining the demurrer to the second count would in any case be that it does not specify the acts of assistance constituting the alleged misdemeanor. Such a specification would be essential in a penal action brought as prescribed in sec. 5. (U. S. vs. McElroy, 115 U. S. 252.) The case is not one in which it is enough to state the charge in the mere words of the statute.

The demurrer is sustained as to both counts.

A true record.

Attest: FRANK H. MASON, *Clerk.*

7 *Petition of the United States of America for a writ of error, filed October 20, 1908.*

Now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings, and also in the rendition of a judgment in a plea between the petitioner and one Tilden B. Stevenson and one Amede Bellaire, alias Joseph Bellaine, which was heard upon demurrer to the indictment in said cause in the District Court of the United States for said district at the September term, A. D. 1908, to wit, on the twenty-first day of September in said year, manifest error hath intervened to the great damage of the petitioner, in that said court did illegally and upon an improper construction of the statute of the United States upon which said indictment was founded, sustain the demurrer thereto, and did quash said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

8 *Assignment of errors, filed October 20, 1908.*

And for errors committed by the court in sustaining said demurrer and quashing said indictment, the petitioner alleges as follows:

1. Said court erred in holding that the first count of said indictment did not well allege a violation by the defendants of section 8 of the immigration act approved February 20, 1907.

2. Said court erred in holding that a violation of said section of said act could not be committed by bringing an alien not entitled to enter the United States from the Dominion of Canada into the district of Massachusetts.

3. Said court erred in holding that said indictment did not well allege a violation by the defendants of section 4 of said act.

4. Said court erred in holding that a violation of said section 4 can not lawfully be prosecuted by criminal indictment.

5. Said court erred in holding that under the provisions of said section 4 your petitioner could only proceed to recover a penalty for the violation thereof by civil action.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

9 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss:

The President of the United States, to Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine (criminal docket case No. 143), greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the sixteenth day of November next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Massachusetts wherein the United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, judge of the District Court of the United States for the District of Massachusetts, this twentieth day of October, in the year of our Lord one thousand nine hundred and eight.

FREDERIC DODGE,
U. S. District Judge.

10 UNITED STATES OF AMERICA,
District of Massachusetts, ss.

Due and sufficient service of the within writ is hereby accepted.

HERBERT PARKER,
Attorney for the within named defendants in error.

11 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Frank H. Mason, clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled The United States of America, by indictment, versus Tilden B. Stevenson and Amede

Bellaire, alias Joseph Bellaine, No. 143, in said District Court determined, the petition of the United States for writ of error, the assignment of errors, and also the original citation on writ of error issued in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this eleventh day of November, A. D. 1908.

[SEAL.] FRANK H. MASON, *Clerk.*

(Indorsement on cover:) File No. 21,411. Massachusetts D. C. U. S. Term No. 292. The United States, plaintiff in error, vs. Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaire. Filed November 14th, 1908. File No. 21,411.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
TILDEN B. STEVENSON AND AMEDE BELLAIRE, alias JOSEPH BELLAIRE, defendants in error. } No. 292.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

In this case the United States has sued out a writ of error under the criminal appeals act (34 Stat., 1246) to review the action of the District Court for the District of Massachusetts in sustaining defendants' demurrer to the second count of the indictment against them. This indictment contained two counts, whereof the first charged defendants under section 8 of the immigration act of February 20, 1907 (34 Stat., 898, 900), with unlawfully bringing certain alien contract laborers from Canada into the United States; and the second count charged against defendants, under section 4 of the same act, that

they "did knowingly, wilfully, and unlawfully assist certain alien contract laborers, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque, and Rosina L'Eveque, to migrate from the town of Riviere de Loup, in the Dominion of Canada, to the United States, in pursuance of an offer made to them, the said alien contract laborers heretofore mentioned, by the said Amede Bellaire, otherwise known as aforesaid, to perform unskilled labor in the United States." (Rec., 3.)

Upon demurrer by defendants to each count of the indictment the District Court held the first count bad "for repugnancy," on a ground which does not allow review by this court, but the second count of the indictment, charging defendants with assisting the contract laborers to migrate from Canada into the United States in violation of section 4 of the immigration act, was held bad by the District Court on the ground that the remedy given by section 5 of the immigration act for violation of section 4, in the way of an action of debt for the statutory penalty of $1,000, is exclusive, and indictment therefore will not lie for a violation of section 4. (Rec., 5, 6.)

Such decision as to the second count by the District Court warrants direct review by this court under the criminal appeals act, because the decision was based upon the construction of the statute under which the second count of the indictment was found; unless that right of immediate review by this court of the District Court's decision concerning the second count is lost through the fact that, after holding the

second count bad because the statutory allowance of an action of debt for the penalty excludes prosecution by indictment, the District Court expressed this further opinion concerning such second count:

> A further reason for sustaining the demurrer to the second count would in any case be that it does not specify the acts of assistance constituting the alleged misdemeanor. Such a specification would be essential in a penal action brought as prescribed in sec. 5. (*U. S.* v. *McElroy*, 115 U. S., 252.) The case is not one in which it is enough to state the charge in the mere words of the statute. (Rec., 6.)

Such further statement of the District Court is perhaps not a positive decision that the second count is bad for formal insufficiency as a pleading; but, treating the quoted statement of the opinion as an additional ground on which the second count was actually held to be insufficient, we shall then have the case of an indictment, or count of an indictment, quashed by the court below for two independent reasons, of which one is based upon the "construction of the statute upon which the indictment is founded" (warranting review by this court under the criminal appeals act), and the other is not of a character in itself to warrant review by this court; and it will be argued in this brief, before passing to the merits, that in such situation the writ of error from this court lies, and this court is authorized to pass upon the propriety of the lower court's construction of the statute, and this court indeed is authorized to pass upon the cor-

rectness of both positions which the lower court took in sustaining the demurrer.

Sections 4 and 5 of the immigration act, upon which the second count of the indictment rests, read as follows:

> SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.
>
> SEC. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the

duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

ASSIGNMENT OF ERRORS.

I. The district court erred in sustaining the demurrer to the second count of the indictment upon the ground that a violation of section 4 of the immigration act of 1907 may not be prosecuted by indictment.

II. Said court erred in holding that under the provisions of the immigration act of 1907 the penalty imposed for a violation of section 4 of that act can be recovered only in a civil action.

III. Said court erred in holding that the second count of the indictment does not well allege a violation by defendants of section 4 of said immigration act of 1907.

IV. Said court erred in sustaining the demurrer to the second count of the indictment.

ARGUMENT.

I.

This court has jurisdiction to review the action of the district court in sustaining the demurrer to the second count of the indictment.

If the district court had put its decision against the second count upon the sole ground that a violation of section 4 of the immigration act can not be prosecuted by indictment, because action of debt for the penalty is the exclusive remedy, there would be

no doubt of this court's jurisdiction, because then the decision of the district court would have been based solely upon construction of sections 4 and 5 of the statute. The only question concerning jurisdiction arises through the fact that the district court seems to have quashed the second count of the indictment upon the two separate grounds that the statute does not allow the remedy of indictment and that the indictment was bad as a pleading because it did not specify the particular acts whereby defendants were claimed to have assisted the alien contract laborers to migrate into the United States. It may be argued in this situation that this court can not entertain the appeal, even for the purpose of correcting error of the district court in construing the statute as forbidding the remedy of indictment, because this court can not review the action of the district court in holding additionally that the indictment is bad as a pleading, inasmuch as the latter decision is not of a kind in itself to justify appeal to this court, and it was said in *United States* v. *Keitel* (211 U. S., 370) that the purpose of the criminal appeals act "was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case" (p. 398). If in this case the Supreme Court can not pass upon both grounds on which the district court held the second count bad, it may be said that the court can not even pass upon the district court's construction of the statute, in holding that the only remedy under

that statute is an action of debt, because the action of the district court in quashing the count can not be reversed by this court unless all the grounds on which that quashing was based can be pronounced by this court to be erroneous.

The distinction between this case on the one hand and the Keitel case and other cases announcing a like rule on the other hand is that in this case the district court actually based its decision upon two grounds, whereof one is and the other is not sufficient to warrant an appeal to this court, whereas in the Keitel case and its kindred cases questions other than that which warranted appeal to this court were raised in the court below, but were not actually decided by the court below and made a basis of its judgment against the indictment. In the Keitel case and its associated cases there was therefore nothing in the actual decision in the court below for this court to clear away before it could reverse the court below, as soon as this court had found that the lower court had erred upon the point which supported an appeal. And, after reversal of the lower court by this court upon the point which supported an appeal, the lower court was then for the first time called upon to consider the other questions which had been raised against the indictment before it, but had not previously been decided by it.

Of course, when this court finds the lower court right upon the point which has made direct appeal to this court allowable, it can at once affirm the judgment of the lower court without consideration

of any other question raised or decided in the lower court. Such were the cases of

United States v. *McDonald*, 207 U. S., 120.
United States v. *Mason*, 213 U. S., 115.

Also, when this court finds the lower court wrong upon the point which made appeal allowable, it can at once reverse the judgment of the lower court without consideration of any other questions raised in the lower court but not actually decided by it. Such were the cases of—

United States v. *Bitty*, 208 U. S., 393.
United States v. *Keitel*, 211 U. S., 370.

Indeed, if in either of the last two cases where the lower court was reversed, any question other than that which made appeal allowable had actually been decided by the lower court, then the reversal of the judgment below by this court without consideration of such other question is authority for the present appeal and for a reversal of the lower court without consideration of the sufficiency of the second count of the indictment as a pleading, in case this court finds the lower court's construction of the statute as prohibitory of indictment to be erroneous.

It accordingly results that the question of this court's jurisdiction of the present appeal and the question of the scope or extent of that jurisdiction are open, unless the Bitty case or the Keitel case supports this court's jurisdiction of the present appeal and determines that the judgment below may be reversed, if the lower court's construction of

the statute as prohibitory of indictment was wrong, without any consideration of the lower court's opinion that the second count of the indictment did not conform to the rules of proper criminal pleading. What, then, should be held as to the existence and extent of this jurisdiction on an appeal in the circumstances of the present case?

The criminal appeals act, in allowing immediate appeal when the particular questions of law enumerated in the act have been decided against the Government, intends unquestionably to rid the Government of the obstruction of criminal justice through mistakes of the inferior courts on such questions of law. The statutory purpose must be wholly defeated in a case like the present, however, if the pending appeal does not lie; for, should the Government stop the pending prosecution because of the alleged informality of the indictment as a pleading, and should a new indictment correcting the alleged informality be presented by the grand jury against defendants, the Government would at once meet in the new case under the new indictment a well-founded claim by defendants that it was estopped by the judgment of the District Court on the present indictment, based upon an actual decision that indictment will not lie for a violation of section 4 of the immigration act. The Government could make no answer to such defense of estoppel against the new indictment; and so it appears, as already stated, that unless the present appeal lies, the unmistakable

purpose of the criminal appeals act is defeated in the present litigation, and must be defeated in all other litigations in which a like situation may arise; and erroneous construction by a lower court of the statute on which an indictment is founded must go frequently uncorrected notwithstanding the purpose of the criminal appeals act to subject generally to this court's scrutiny the construction against the Government of a statute underlying an indictment.

When a lower court quashes an indictment on two separate grounds, of which one is such as gives an appeal but the other is not, this court has a choice of three alternatives (unless the appeal is to be dismissed), viz:

(1) It may decide the expressly appealable question and thereupon affirm because it does not consider the other ground of the decision below; but in that event the court would render opinion upon a moot point, because its determination of that point against the view of the lower court could not affect the judgment below, which would be affirmed without reference to this court's conclusion on the expressly appealable question.

(2) Or, this court may decide the expressly appealable question against the view of the lower court, and thereupon reverse the judgment below for the mistake on that question, though it does not consider the other ground on which the lower court also based its decision.

(3) Or, finally, this court may not only consider the expressly appealable question, but upon deciding

that question against the lower court may consider further the other question on which the court below based its judgment; in order, first, that the Government may have correction of the lower court on the expressly appealable question, and, second, that the action of this court may not be a mere expression of opinion on a moot point (as in case 1), or an arbitrary reversal of the judgment below without consideration of all the grounds on which the lower court actually based that judgment (as in case 2).

Of these three alternatives the first seems out of question; and it is quite immaterial on the present appeal whether the court adopts the second or the third alternative, because in either of these latter two cases the question on which the Government has an express right of appeal will be decided.

As between the second and third alternatives, it would seem that the third is right, because, in the first place, it avoids reversal of the lower court without consideration by this court of all the points on which the lower court actually grounded its judgment, and, in the second place, it disposes of the judgment concerning which the Government has a right to appeal. Indeed, the second alternative comes almost to the first, viz, an affirmance notwithstanding this court's conclusion against the lower court upon the expressly appealable question, because, notwithstanding reversal of the judgment below by this court for error upon the expressly appealable question, the lower court must still at once enter the same judgment as it did before appeal, on

the ground formerly held by it to be a sufficient basis for such judgment and not considered by this court. And yet the reversal of the judgment of the lower court, even upon the second alternative rule, will often have important practical consequences, as this case serves to illustrate. The United States could stop the pending prosecution of defendants after the reversal of the judgment below by this court, and thereupon a new indictment could be found by the grand jury against defendants in a form avoiding the supposed insufficiency of the present indictment as a pleading; and then defendants could not meet the new indictment with the claim that the Government was estopped by the decision of the lower court in the present case (reversed by this court) that the statute does not allow prosecution by indictment.

On the other hand, if this court should not take jurisdiction of the present appeal, then in case the Government should seek to correct the supposed defect of form in the present indictment by getting a new indictment, defendant could defeat the new corrected indictment by the estoppel of the lower court's former decision that indictment is not proper under the statute; and so, even after correction of the formal point concerning the present indictment, the Government still could not get the question of statutory construction before this court for decision on its merits.

The practical illustration just given—concerning the effect of an unappealable judgment as an estop-

pel—shows how, if appeal does not lie under the criminal appeals act in such a case as the present, the Government in very many litigations can not obtain at any time or by any method the benefit of decision by this court of the very kind of questions which it is the express object of the criminal appeals act to have this court decide.

Nor is there anything in the language of the criminal appeals act which forbids the idea that in such a case as the present the Government can have a review by this court, either of the question of statutory construction alone, or of both that question and the other question on which the lower court rested its judgment.

(*a*) This case is literally with the language of the criminal appeals act, which declares:

> That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

The judgment below is based upon construction of the statute upon which the indictment is founded. The criminal appeals act does not say that the judgment must be based *solely* upon such construction.

(*b*) As already stated, it is at least allowable to reverse the judgment below for error on the question of statutory construction without considering the formal sufficiency of the indictment; because that reversal will at least relieve the Government from a defense of estoppel by the judgment below, on the question of statutory construction, as against a new and clearly formal indictment.

(*c*) Nothing in the criminal appeals act, however, in terms limits this court upon a proper appeal under the act to consideration of the single question which gives the right of appeal. The scope of the inquiry in this court upon a proper appeal is itself purely a question of construction, through inference from the general structure and object of the act; and the practical operation of the act in such a case as the present—according to one or another view of the boundary of this court's inquiry—is of the utmost importance.

In a case like the present, where the question which gives the right of appeal calls for determination, but the actual decision of another point by the lower court equally led to the judgment below—so that this court's decision of the question which gives appeal must be supplemented by decision of the other question decided by the lower court, in order to ascertain what consequence upon the judgment below this court must attach to its own decision of the question which gives appeal—it is correct to say that each question made by the lower court a basis of its judgment is involved in the appeal, as a necessary inci-

dent of it, or that the question which gives the right of appeal brings the other question with it. Both questions are indissolubly connected in their influence upon this court's direction to the lower court.

All the while the difference must be remembered between this case and other cases in which questions not of a kind to give the right of appeal have been raised in the lower court, beside the question which gives appeal, but have not been actually decided by the lower court. In these latter cases no question but that which gives the right of appeal need be considered by this court, since this court's decision upon the question which gives the right of appeal is sufficient at once to justify affirmance or reversal. If the lower court is reversed by this court on the question which gives the right of appeal, the lower court can then for the first time take up the other questions formerly presented to it but not decided by it. The case goes back then for free treatment by the lower court of all questions except the particular question decided on appeal by this court. But the rule as to this court's inquiry in such situation is wholly different from what it must be when, as in this case, the lower court has already before appeal grounded its judgment both on the question which gives the right of appeal and on some other question.

If this court reaches the conclusion that, inasmuch as the right of appeal existed by reason of the question of statutory construction, it may proceed to decide both that question and the other question determined by the court below as to the sufficiency of

the indictment, then all anomaly of procedure will disappear. But even if this court determines that it can decide only the question of statutory construction, which gives the right of appeal, and then may reverse for error on that point without going into the question of the sufficiency of the indictment, such procedure will be no more anomalous than the reversal in the Keitel case, *supra*, without consideration of all questions actually existing in the case as to the sufficiency of the indictment. As already said, it is not altogether clear that the inferior court had not actually decided some of those questions, besides the point of statutory construction, in the Keitel case; but if it had not the reversal by this court without consideration of such questions was nevertheless an anomalous proceeding, in that a judgment quashing an indictment was reversed without consideration of the question whether in fact the indictment was good. A reversal of the judgment quashing the indictment in this case will be no more peculiar if here, as in the Keitel case, the court disregard all other questions than the proper statutory construction. It is submitted, as already contended, that under the circumstances of the present case the court ought to pass upon both questions actually decided below; but, however that may be, the mere fact that the questions affecting the indictment, other than the question of statutory construction, were perhaps not decided below in the Keitel case, but were decided below in this case, can not justly lead to the result that in the Keitel case this court could reverse with-

out considering whether the indictment was sound and supportable; but in this case the court can not do the same. The rule of the Keitel case allows reversal of a judgment quashing an indictment, though that indictment be actually bad; and the same power of reversal ought to exist, though the court below has found the indictment bad, if there has been error upon the question of statutory construction.

II.

Indictment is an allowable mode of prosecution for violating section 4 of the immigration act of 1907; and the action of debt allowed by section 5 is not exclusive.

Many considerations concur to this result.

1. The entire argument against use of the indictment rests upon the supposed applicability of the rule that where a statute creates a new offense and prescribes a special remedy for prosecuting that offense, such remedy is exclusive. This rule, however, is like other rules of statutory interpretation, a mere aid toward ascertaining the true legislative intent; and like other rules of statutory interpretation this particular rule has frequent exceptions, and its force in a given case may be weakened and indeed its operation may be entirely displaced by other rules of construction or by special features of the enactment which creates the offense. Of this rule concerning the supposed exclusiveness of a statutory remedy this court has said:

> But it is important to notice upon what the rule is founded. The reason of the rule

> is that the statute, by providing a particular remedy, manifests an *intention* to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. (*Savings Bank* v. *United States*, 19 Wall., 227, 238, 239.)

Our question, therefore, is this: Does the language of the immigration act of 1907 disclose a legislative purpose to prohibit indictment?

2. At the outset it is noticeable that the wording of section 5 as to action of debt is merely permissive. It says that the penalty "*may* be sued for and recovered" by the United States or by an informer in an action of debt. There is here certainly no express prohibition of indictment.

In Crofton's case (1 Mod., 34) it is said by Justice Twisden:

> If the statute appoint, that the penalty shall be recovered by bill, plaint, &c., and not otherwise, there I confess an indictment will not lie; but without negative words I conceive it will, though the statute be introductive of a new law, and create an offence which was none at the common law; for whenever a thing is prohibited by a statute, if it be a public concern, an indictment lies upon it: and the giving other remedies, as by bill, plaint, &c., in affirmative words shall not take away the general way of proceeding which the law appoints for all offences.

3. An intention to limit the Government to a particular remedy, and thereby to deny it the ordinary

and indeed usual remedies of indictment or information for prosecution for a penalty will not readily be inferred.

So it was held in *Savings Bank* v. *United States, supra,* where this court decided that certain statutory restrictions upon procedure were against others than the Government, saying:

> The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the Government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the State. It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of parens patriæ, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

> It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues (p. 239).

In *United States* v. *Stocking* (87 Fed., 857) it was said:

> The general rule has been that, when the United States seeks to enforce a penalty, it is not limited to any one remedy. This was the view entertained by Judge Deady in the case of *U. S.* v. *Howard* (17 Fed., 638). In order to justify a court in holding that congress has by any act narrowed the rights of the United States in any particular as to any remedy, that intention ought to clearly appear (p. 862).

4. When a statute creates an offense punishable by penalty, and prescribes no remedy or allows some special remedy not intended to be exclusive, either indictment or information will lie, because they are the ordinary and approved methods of prosecution for an offense not above a misdemeanor.

As to indictment:

> 2 Hawk. P. C., ch. 25, sec. 4.
> 1 Chitty's Crim. Law (Am. ed., 1847), 162 (star paging); Harris's Crim. Law (London, 1901), p. 333.
> *U. S.* v. *Chouteau*, 102 U. S., 603, 610.

As to information:

> 2 Hawk. P. C., ch. 26, secs. 1, 2.
> 1 Chitty's Crim. Law, pp. *844, 845.
> 4 Bl. Com., 309, 310.

Harris's Crim. Law, p. 343.
U. S. v. *Buzzo*, 18 Wall., 125.
Ex parte *Wilson*, 114 U. S., 417, 424, 425.

In *Adams* v. *Woods* (2 Cr., 336) Chief Justice Marshall said:

> Almost every fine or forfeiture under a penal statute, may be recovered by action of debt as well as by information. * * * In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie (p. 341).

It would be strange if Congress intended to forbid the use in the present case of such general remedies as indictment or information. What reason is there for prohibiting their use in prosecution of the offense charged in this case?

5. Most of the cases announcing the rule that a statute creating an offense and prescribing a remedy excludes other remedies than the one prescribed apply to statutes which in terms *require*, instead of merely permitting, the special remedy. Thus in *United States* v. *Simms* (1 Cr., 251), which is the case upon whose authority most other cases in this country state the rule, the statute considered by Chief Justice Marshall read that any person suffering the game of billiards in his house should "for every such offense forfeit and pay the sum of $150, *to be recovered* in any court of record by any person who will sue for the same." The statement "to be recovered" was obviously the same as if the statute

had read "which *shall be* recovered." Either of these two forms of language is mandatory, and either is altogether different from the language of section 5 of the immigration act, which merely says that the action of debt "*may be*" used.

Among other leading cases for the rule which is supposed to forbid indictment in this case, many will be found upon inspection to rest upon statutes which, instead of merely permitting the special remedy, disclose an affirmative purpose to exclude other remedy. For example:

> Castle's case, 2 Croke Rep., 643; 2 Rolle, 247.
>
> *King* v. *Marriot*, 4 Mod., 144.
>
> *King* v. *Pensax*, 2 Sess. Cas., No. 158.
>
> See 18 Hen., 6, c. 11, and clause relating to penalty as translated in 4 Mod., 144.
>
> *Stephens* v. *Watson*, 1 Salk., 45.
>
> Anonymous (case No. 114), 6 Mod., 86.

Castle's case seems to be the chief source of the rule. It is often relied upon in later cases, and sometimes is the only case cited for the doctrine. As reported in 4 Mod., 144, the statute uses the mandatory words "to be recovered," and so is exactly like the statute considered in the leading case in this court, *United States* v. *Simms*, *supra*.

And the rule has often been criticised, at least in particular applications. Chief Justice Holt said in *King* v. *Marriot* (4 Mod., 144, 145):

> An indictment being a summary way of proceeding, is more beneficial for the subject;

> and therefore it seems reasonable that such a method should be pursued. To convey a maid from her parents under the age of sixteen years is no offense at the common law; it is made so by a particular statute; and authority is given to the star-chamber by *information*, and to the justices of assize by *indictment*, to determine the offense; but yet the Court of King's Bench is not excluded; and so it has been constantly held since the making of the law. It is prohibited by the statute of 22 Car., 2, c. 12, to travel with more than five horses at length; this is a *new law* and a *new offense;* and yet it was held, that an indictment would lie in the Court of King's Bench against the offender, though a particular punishment is directed by that statute.

In *Shepherd* v. *Hills* (11 Exch., 55, 67) the decision was in accordance with the following statement of Baron Parke:

> There is no doubt that wherever an act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the contrary. It is true that this statute gives a power of distress, but that is clearly a cumulative remedy.

The truth is that general rules are not often of high importance in ascertaining legislative intent in a particular statute; and it is also true of the rule under discussion, as of most general rules, that it has often been seriously misapplied. In particular, the present rule should have much less force to de-

prive the public of ordinary and approved methods of prosecution, which fully safeguard the interests of the citizen, than it may have in reference to the enforcement of mere private rights.

6. The express allowance of the action of debt for the penalty imposed for violation of section 4 is better explained by a congressional purpose to make it unmistakable that the United States should not be limited to indictment or information (but also should have the remedy of action of debt) than by any supposition that Congress intended to exclude indictment or information.

This explanation is natural, and likewise it is suggested by judicial history.

(*a*) This court itself, in *United States* v. *Chouteau* (102 U. S., 603), expressed a doubt concerning the right to sue for a penalty by action of debt instead of indicting. Mr. Justice Field said:

> It may be questioned whether the only mode for a recovery of the penalty is not by indictment; but assuming that it may be recovered in a civil action, the compromise pleaded covers the penalties here claimed (p. 610).

And further:

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for an infraction of the law (p. 611).

(*b*) The primary object of allowing civil action, as section 5 does allow it, was plainly to allow informers to sue, it being desired in that way to induce

disclosure of violations of the law and to encourage prosecutions. Now, if the statute had stopped with saying that an informer could sue for penalty by action of debt—whether in his own name or in the name of the United States—it could have been argued with some force that the express allowance of the civil action to the informer excluded its use by the United States. Just such a contention was made and decided in—

United States v. *Bougher*, 6 McLean, 277.
See also *United States* v. *Stocking*, 87 Fed., 857.

Putting together the doubts, justified by previous judicial contention and utterance, whether the United States could prosecute otherwise than by indictment or information for the penalty, if the statute were silent as to remedy, and especially if an express allowance of the civil action of debt were made by the statute only in favor of an informer, we have ample reason for saying that Congress more probably meant to meet those doubts and to make clear the right of the United States to use the civil remedy, than to forbid the common remedies for enforcement of a penalty, viz, indictment or information.

7. The deliberate declaration of Congress in section 4 of the immigration act of 1907 that the offense should be a "misdemeanor" ought to settle the matter. Section 4 of the immigration act of 1903 (32 Stat., 1214) said "that it shall be *unlawful* for any person * * * to assist or encourage the importation or migration of any alien into the United States,"

etc. Section 5 of this act of 1903 was as to remedy identical with section 5 of the act of 1907. The words "that it shall be unlawful" in section 4 of the act of 1903 were deliberately changed, however, to "that it shall be a misdemeanor," etc., in section 4 of the act of 1907. Having quoted sections 4 and 5 of the act of 1907 in the preliminary statement of this brief, I quote below sections 4 and 5 of the act of 1903:

> SEC. 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.
>
> SEC. 5. That for every violation of any of the provisions of section four of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parole or special, to or with such alien, shall forfeit and pay for every such offence the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor

> in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

It appears from comparison of the enactments of 1903 and 1907 that the change from denouncing the offense as merely unlawful to characterizing it as a misdemeanor was made for its own sake. The change was not casual, nor was it incidental to any other change. This change, then, must have been made with a substantial purpose of its own. What was that purpose? Obviously, in the first place, to put beyond a doubt and make emphatic the criminal character of the offense. But why do that, when the penalty for the offense was not altered from the $1,000 forfeiture already prescribed in 1903? Only three answers seem possible; it was the congressional purpose, in expressly pronouncing the offense a misdemeanor, either—

(1) To put beyond argument the right of prosecution by indictment or information, the ordinary methods of prosecuting for a misdemeanor; or

(2) To make the offense fall, beyond doubt, within the reach of section 5440 of the Revised Statutes,

which denounces and punishes a conspiracy to "commit any offense against the United States;" or

(3) To accomplish both of the foregoing purposes.

The first purpose is entirely direct and natural; and, further, that purpose would also accomplish the second purpose, because nobody can argue that an indictable crime is not an offense against the United States within Revised Statutes, section 5440. If, on the other hand, we suppose that Congress had the second purpose, viz, to make Revised Statutes, section 5440, unmistakably embrace a conspiracy to commit the offense denounced by section 4 of the immigration act, it can hardly then be said that Congress did not wish a violation of section 4 to be indictable. So that we reach the result that whichever of the first or second purposes, viz, to make the offense indictable or to make section 5440 unmistakably reach a conspiracy to commit the offense, we ascribe to Congress, it is either certain or probable that Congress was influenced by the other purpose.

Nor should it be overlooked that, so far as any opposed theories concerning remedy might arise from saying, on the one hand, that violation of section 4 should be a misdemeanor and from expressly sanctioning, on the other hand, a civil action of debt, the legislative classification of the offense as a misdemeanor is the later act. There is really no incongruity between making the offense a misdemeanor and allowing an action of debt for its punishment, if the allowance of civil action is merely permissive and

not exclusive of ordinary criminal prosecution; but, if incongruity is introduced by making the civil action exclusive, then the later deliberate declaration of Congress that the offense shall be a misdemeanor must of course be given controlling influence.

The true treatment of the statute harmonizes all its parts to the full—as statutes of all kinds are harmonized—by holding that the permissive statement that the penalty "may be" recovered by action of debt does not exclude indictment or information.

8. Such authority as exists favors the allowance of indictment.

In *Lees* v. *United States* (150 U. S., 476) the United States sued in a civil action of debt under section 3 of the immigration act of February 26, 1885, which was identical with section 5 of the act of 1907 in its allowance of such civil action. The statute is quoted in the opinion (p. 478). Lees claimed that the action should have been brought in the Circuit rather than in the District Court. This court said:

> Hence, when, as here, a statute imposes a penalty and forfeiture, jurisdiction of an action therefore would vest in the District Court, unless it is in express terms placed exclusively elsewhere. If the words, "as debts of like amount are now recovered," were omitted from this last clause, the construction claimed by counsel might be sustained; jurisdiction would then be given to the Circuit Courts. So, if those words were in parenthesis, or even separated from the last part of the clause by a comma, or any similar punctuation, there

> would be plausibility in the contention; but taking the clause as a whole, giving force to all its words, it would seem to refer to the form of the action rather than to the forum. *When it is remembered that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action of debt,* and also that the Circuit Courts of the United States are, as contradistinguished from the District Courts, the Federal courts of original civil jurisdiction, the significance of this clause is clear. It in effect provides that, although the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts. Repeals by implication are not favored, and the general grant of jurisdiction to the District Courts of suits to recover penalties and forfeitures should not in any case be transferred exclusively to the Circuit Courts by words of doubtful import (p. 479).

This language, stating the rule that a penalty "may be recovered by indictment or information in a criminal action," as well as by a civil action, was used while a statute expressly permitting civil action was under consideration.

Similar support for indictment, though civil action as allowable, is found in—

United States v. *Stocking,* 87 Fed., 857.
United States v. *Howard,* 17 Fed., 638.

There is nothing really to the contrary in *Globe Newspaper Co.* v. *Walker* (210 U. S., 356). That case was an action for damages for infringement of the copyright of a map, under Revised Statutes, sections 4964–4970; and the statutes were held to manifest an intent to limit a map owner's remedy, for his new right under the statutes, to his recovery of one-half the penalties, being $1 per sheet, put upon the infringer. There could be no doubt of the legislative intent in that case; and beyond that the question, in a practical view, was concerning the extent and value of the right of copyright, rather than, as here, a mere question of remedy not reacting upon the nature or value of the right. Revised Statutes, sections 4964–4970, were held to provide a complete system of copyright privileges, with their respective remedies. The court said:

> We think these statutes, taken together, indicate the purpose of Congress to provide a system of remedies to enforce the rights which have been granted to those who shall avail themselves of the statutes of the United States, and, in accordance therewith, become the owners of the exclusive right for a limited term to publish and multiply the copyrighted work (p. 367).

Further, actions for damages were expressly given by the statutes to the owners of the copyright of books (sec. 4964) and to the owners of the copyright of manuscripts (sec. 4967). No such action was accorded

to the owner of the copyright of a map; and instead he was given, really as liquidated damages, fifty cents per sheet, being one-half of the penalty of one dollar per sheet expressly put upon the infringer. In these circumstances it was evidently intended that the half of the penalties given to the copyright owner should be in lieu of ordinary action for damages. A specific remedy, different from ordinary action for damages, was also given by the statutes for wrongful representation or performance of a dramatic or musical composition; being $100 for the first and $50 for every subsequent performance, payable to the copyright owner. It could not be claimed that an action for damages could be prosecuted in addition to the receipt of these large penalties; and the analogy was exact with the case of a map copyright. Finally, the question was solely concerning private interests.

All the cases cited by the court in *Globe Newspaper Co.* v. *Walker*, *supra*, relate to the remedy for enforcement of a stockholder's liability for corporate debts, viz:

Pollard v. *Bailey*, 20 Wall., 520.

Fourth National Bank v. *Francklyn*, 120 U. S., 747.

Evans v. *Nellis*, 187 U. S., 271.

Middletown National Bank v. *Toledo, etc., R. R. Co.*, 197 U. S., 394.

In all these cases the very nature of the stockholders' obligation depended upon, and therefore was itself controlling upon, the kind of remedy allowed; and only such action as the statute created

was consistent with the nature and essential incidents of the stockholders' obligation. The first case, *Pollard* v. *Bailey* (20 Wall., 520), illustrates the whole matter. The rule of liability was, as declared by the statute, that "individual stockholders, having shares in said bank, shall be bound respectively for all the debts of the bank in proportion to their stock holden therein" (p. 521). It was of course of much importance under this language whether the stockholder should be liable absolutely to a single creditor, in disregard of the needs of other creditors and also of the responsibility of other stockholders, or whether the suit must be for the benefit of all stockholders to enforce only such proportionate liability of the defendant stockholder as the relation of all debts to all stockholders' liability might require. This court said:

> Each stockholder is bound for the debts in proportion to his stock. His liability is not limited to the par value of his stock, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. * * * This proportion can only be ascertained upon an account of the debts and stock and a *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made (pp. 524, 525).

And it was therefore held that the action by a single creditor against a single stockholder would not lie, and the statutory action for adjustment of the liabilities of all stockholders to all creditors was exclusive of other remedy. The nature of the creditors' right and of the stockholders' obligation so demanded. Similar, though not identical, considerations govern the other cited cases concerning suits by corporate creditors founded upon stockholders' liability.

9. What detriment to defendant can be suggested through his being prosecuted by indictment or information rather than by civil action? Any differences of procedure are all in favor of defendant when resort is had to indictment. Defendant then is given the protection of the grand jury, in refusing to present indictment unless the required number of grand jurors find probable cause; he escapes the rule that in a civil action he need not be confronted with the witnesses against him (*United States* v. *Zucker*, 161 U. S., 475), and he also escapes the rule that in a civil action for the penalty a verdict may be directed against him by the court on undisputed testimony (*Hepner* v. *United States*, 213 U. S., 103). No reason of substance makes the civil action more advantageous for defendant.

10. The question of this case, as to exclusion of indictment by mere allowance (without requirement) of a civil action for penalty, is likely to occur either upon other statutes already enacted or under future legislation, and the Government ought not to be restricted in its choice of remedies, without reason that clearly compels it.

III.

The second count of the indictment is not informal because it fails to specify particular or detailed acts of assistance to the migration of the alien contract laborers into this country. The general allegation was enough.

This question arises here only in case this court, before reversing the judgment below, will consider the sufficiency of the indictment as a pleading.

The exact language of the indictment is that defendants "on the twelfth day of July, in the year of our Lord one thousand nine hundred and seven, at said Manchaug, did knowingly, wilfully, and unlawfully assist certain alien contract laborers, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque and Rosina L'Eveque, to migrate from the town of Riviere de Loup, in the Dominion of Canada, to the United States, in pursuance of an offer made to them, the said alien contract laborers heretofore mentioned by the said Amede Bellaire, otherwise known as aforesaid, to perform unskilled labor in the United States, they, the said alien contract laborers, or either of them, not being then and there professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for a college or seminary, or persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants; all of which they, the said Stevenson and Bellaire, otherwise known as aforesaid, then and there well knew." (Rec., 3.)

Here is full specification of time of the assistance, of the place of assistance, of the persons assisted, of the

thing assisted. More should not be required; especially as the statute in defining the offense itself does not specify more.

The central principles on this subject have been stated as follows:

> The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense, as in *United States* v. *Carll* (105 U. S., 611), where a statute against passing counterfeit money failed to aver the *scienter*. But where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in some other section. (*Ledbetter* v. *United States*, 170 U. S., 606, 611, 612.)
>
> The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him. (*Burton* v. *United States*, 202 U. S., 344, 372.)

Beside such general principles, specific decisions of this court sustain the present indictment.

1. It is enough to say in an indictment for aiding and abetting a crime that the defendants aided and abetted, without particularizing the acts of aiding or abetting.

United States v. *Simmons*, 96 U. S., 360, 363.
United States v. *Mills*, 7 Pet., 138, 141.
Evans v. *United States*, 153 U. S., 584, 587.
Coffin v. *United States*, 156 U. S., 432, 448.

Mr. Justice White said in this last case:

> Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in *United States* v. *Simmons* (96 U. S., 360, 363), as follows: "Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement. It is laid down as a general rule that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance.' (2 Wharton, sec. 1281; *United States* v. *Gooding*, 12 Wheat., 460.)" The form books give the indictment substantially as it appears here. (Bishop's Forms, sec. 114, p. 52.) Nothing in *Evans* v. *United States* (153 U. S., 584), conflicts with these views. In that case the question was whether the eighth count stated misapplication of the funds, and not whether the particular acts by

> which the aiding and abetting were done were necessary to be set out in the indictment. On the contrary, the counts there held good charged the aiding and abetting in the very language found in the indictment in hand, "and the said Evans did then and there knowingly and unlawfully aid and abet the said cashier in such wilful misapplication with intent in him, the said Evans, to injure and defraud," etc. (p. 448).

2. It is enough to aver generally that defendants solicited or incited a crime.

> *United States* v. *Gooding*, 12 Wheat., 460, 474–475.

Mr. Justice Story said in this last case:

> In general, it may be said, that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute. * * * So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means (pp. 474–475).

3. Where the crime is concealment of distilled spirits upon which the tax has not been paid it is enough to charge generally that defendants "did conceal and aid in the concealment of distilled spirits," etc.

> *Pounds* v. *United States*, 171 U. S., 35.

Beyond all this, assisting or encouraging the importation or migration of alien contract laborers is naturally and usually a course of action rather than a single act. It embraces many acts and details.

An attempt at enumeration of the details in the indictment would be both difficult and unsafe, because both of the danger of variance and of confinement of the Government's evidence within the bounds of the enumeration in the indictment, though other acts in pursuance of the general plan of assistance or encouragement were ascertained.

The assistance or encouragement, when it does not lie in a single act, is closely analogous to engagement in a business or occupation, which may be averred generally without the details that make it up.

United States v. *Gooding, supra.*
Ledbetter v. *United States*, 170 U. S., 606.

LLOYD W. BOWERS,
Solicitor-General.

O

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 292.

THE UNITED STATES, PLAINTIFF IN ERROR

v.

TILDEN B. STEVENSON, AMEDE BELLAIRE, *alias* JOSEPH BELLAIRE.

BRIEF FOR THE DEFENDANTS IN ERROR.

INTRODUCTION.

This is an indictment in the District Court of the United States for the District of Massachusetts, charging, in the first count, that the defendants on July 12, 1907, at Manchaug, in said District, did, knowingly, wilfully, and unlawfully, bring into the United States certain alien contract laborers, not lawfully entitled to enter the country, who, on the date stated, left Riviere de Loup in Canada, by train, to come into the United States, in pursuance to an offer previously made to them to perform unskilled labor in the United States.

The second count of the indictment charges that the defendants on July 12, 1907, at said Manchaug, did, knowingly, wilfully, and unlawfully, assist certain alien contract laborers to migrate from Riviere de Loup to the United States, in pursuance to an offer made to them to perform unskilled labor in the United States.

The indictment is found in full on pages two and three of the transcript of record.

To this indictment the defendants jointly and severally filed a demurrer on the ground that the indictment, and each of its counts, set forth no charge or allegation of any crime or offence against the United States, committed within the jurisdiction of the Court, and,

secondly, that the indictment, and each count thereof, set forth no charge of any crime or offence which could, as matter of law, be prosecuted upon an indictment, or within the criminal jurisdiction of said Court (Record, pages 3 and 4).

The Court sustained the demurrer as to both counts, and the Government duly excepted, and thereupon a petition for a writ of error was filed to this Court, in which the Government makes the following assignment of errors:—

1. Said Court erred in holding that the first count of said indictment did not well allege a violation by the defendants of section 8 of the Immigration Act approved February 20, 1907.

2. Said Court erred in holding that a violation of said section of said act could not be committed by bringing an alien not entitled to enter the United States from the Dominion of Canada into the District of Massachusetts.

3. Said Court erred in holding that said indictment did not well allege a violation by the defendants of section 4 of said Act.

4. Said Court erred in holding that a violation of said section 4 cannot lawfully be prosecuted by criminal indictment.

5. Said Court erred in holding that under the provisions of said section 4 your petitioner could only proceed to recover a penalty for the violation thereof by civil action.

The opinion of the Court sustaining the demurrer is found on pages five and six of the Record.

I.

THE COURT DID NOT ERR IN SUSTAINING THE DEMURRER TO THE FIRST COUNT OF THE INDICTMENT.

1. The first assignment of error is that the Court erred in holding that the first count of the indictment did not well allege a violation by the defendants of section 8 of the Immigration Act of February 20, 1907.

The Court has found, as appears by its opinion, that this count of the indictment is bad for repugnancy.

It will be observed that the act which is made a crime by said section 8 of said statute is the *bringing into* or *landing in* the United States, or the attempt to bring into or land, any alien not lawfully entitled to enter the United States, and that this act of the defendants is alleged to have been committed by them at Manchaug, in the District of Massachusetts.

In sustaining the demurrer of the indictment, the Court has taken judicial notice of the fact that Manchaug is in the town of Sutton, Massachusetts, and many miles distant from any point at which it

is possible to enter the United States from without (Record, page 5). The town of Sutton, Massachusetts, is not situate at any point from which immediate entry can be made into the District of Massachusetts from Canada, or any other point without the United States, but is many miles distant from any such possible point or place of entry.

The indictment further sets forth the route by which the alleged alien contract laborers are asserted to have entered the United States from the town of Riviere de Loup, in the Dominion of Canada (Record, page 2).

We have, therefore, in this count of the indictment a charge that the defendants brought into the United States certain alien contract laborers at a place not on the border of the United States, but so situate as to be impossible of such construction, in that, if the crime is alleged to have been committed at Manchaug, it must follow from the actual physical situation of such place that, when the aliens were brought into or landed at Manchaug, they would have long since entered the United States at some other point; and it further appears from the allegations of this count of the indictment that the route by which the aliens entered and so were brought into or landed, was by rail from Canada, and not by sea, consequently it would have been impossible for such aliens to reach the jurisdiction of this Court without already having passed through other districts of the United States; and, if it were necessary, it is submitted that the Court must take judicial notice of this fact.

From earliest times repugnancy in material allegations has been proper ground for demurrer. In

Hawkins' Pleas for the Crown, chapter 25, section 83, the principle is stated in these words:—

> "It seems agreed by all the books that no indictment can be good without expressly shewing some place where the offence was committed: which must appear to have been within the jurisdiction of the Court in which the indictment is taken, and must also be alleged in such a manner as is perfectly free from all repugnance and inconsistency."

It is elemental law that repugnancy in immaterial averments shall not be cause of adverse judgment, but, in the present case, the repugnancy occurs in the cardinal jurisdictional requirement of the place where the alleged crime has been committed. It was essential that the indictment should set forth some place within the jurisdiction of the Court at which the crime was committed.

People v. *Wong Wang*, 92 Cal. 277–281.
McBride v. *State*, 10 Hump. (Tenn.) 615–616.

It has been uniformly held that repugnancy as to time and place is fatal.

State v. *Hayes*, 24 Mo. 358–361.
State v. *Temple*, 38 Vermont, 37–41.
State v. *Haven*, 59 Vermont, 399–406.

Nor is it necessary that the allegations of an indictment should be absolutely repugnant to render it bad. It is sufficient to render it vulnerable on demurrer that the averments are so far inconsistent as to make it uncertain from an inspection of the indictment whether an offence has or has not been committed.

U. S. v. *Grimm*, 45 Fed. 558–560.
Lehman v. *U. S.*, 127 Fed. 41–45.

The offence described in section 8 of the Immigration Act of 1907 is the bringing into, or landing, of the alien, and it is apparent from the wording of the statute that this section has to do solely with the physical act of such transportation, whether "by vessel or otherwise." There is no allegation in this count of the indictment by which it appears that the defendants had anything to do with such physical act of transportation. Moreover, the single offence, contemplated by and within the penalty of the statute, is manifestly complete and consummate when and where the alleged alien has been brought into or landed in the United States. The locus and time of the offence is at the place of entry, upon the territorial boundary of the United States. Were it to be held otherwise, a multiplication of charges for one offence would result, and an accused person might be prosecuted and convicted in any jurisdiction through which the alien had passed, or where, after many migrations, he was finally found.

This count of the indictment, therefore, is defective not only by reason of repugnancy, but by reason of the fact that it alleged a place within the jurisdiction of this Court where the crime is alleged to have been committed, but plainly where it could not have been committed. The further allegations with regard to the route taken by the alleged aliens show that the crime alleged must have been committed, if at all, without the jurisdiction of the District of Massachusetts; nor does it appear from the indictment that at the time when the aliens were actually within the United States the defendants then and there transported them or aided in their transportation.

The obvious inference from the language of the indictment is that some crime may have been committed somewhere in the United States, but certainly not at the place alleged.

The objection was seasonable and properly taken.

Lehman v. *U. S.*, supra.
Comm. v. *Lawless*, 101 Mass. 32.

Moreover, it is apparent from the language of this count in the indictment that the Government, in order to show that the crime

contemplated by said section 8 of the Immigration Act of 1907 had been committed, would have been compelled to rely on evidence of some acts of the defendants shown to have occurred at the place of entry into the United States, and that such evidence would have demonstrated the alleged offence to have been committed in another jurisdiction. Such an indictment is bad.

U. S. v. *Kuhl*, 85 Fed. 624, 626, 632.

2. The second assignment of error is that the Court erred in holding that a violation of section 8 of the Act of 1907 could not be committed by bringing an alien from the Dominion of Canada into the District of Massachusetts.

In answer to this alleged error, it is sufficient to point out that the Court in its opinion does not so hold.

If the language of the indictment had alleged as the place in which the crime was committed any place within the District of Massachusetts, at which it is possible to enter the United States from without, for instance, at Boston or Salem or some other point or place upon the seaboard, the objection which the Court found to the indictment would not have obtained.

There can be no inference drawn from the language of the Court sustaining the demurrer which can support the error alleged in the second assignment.

II.

THE DEMURRER TO THE SECOND COUNT OF THE INDICTMENT WAS PROPERLY SUSTAINED.

1. The allegations of this count of the indictment attempt to charge the violation by the defendants of section 4 of the Immigration Act of 1907, and the third assignment of error is that the Court has held that this count of the indictment does not well allege such violation.

It will be noted that in the second count of the indictment the alleged crime is set forth in the terms of the statute without in any manner specifying the acts of assistance relied on to constitute such a crime (Record, page 3).

It has been held in

U. S. v. *McElroy*, 115 U. S. 252, 253,

that such allegations will not support a penal action founded upon a violation of this section. The Court there finds that it is not sufficient to state the charge in the words of the statute. There must be substance as well as form to support a penal action of this nature.

No such specifications appear in the second count, and the third assignment of error is untenable.

2. The fourth and fifth assignments of error are that the Court, in sustaining the demurrer to the second count of the indictment, held that a violation of section 4 of the Immigration Act of 1907 cannot lawfully be prosecuted by criminal indictment, and the penalty imposed for a violation of such section must be recovered by civil action (Record, pages 5 and 6).

The second count of the indictment charges that the defendants, on July 12, 1907, did, knowingly, wilfully, and unlawfully assist certain alien contract laborers, and charges the defendants in the language of section 4 of the Immigration Act of 1907.

Such assistance is, by the terms of that section, made a misdemeanor, but no penalty for such misdemeanor is prescribed in this section, nor is there any language in the entire statute providing for the punishment of such misdemeanor, except that found in the section immediately succeeding, which is entitled "Penalty for Violation of Provisions," and states specifically that for every violation of the provisions of section 4 of the Act the persons guilty shall

> "pay for such offence the sum of one thousand dollars which may be sued for and recovered by the United States . . . as debts of like amount are now recovered in the Courts of the United States."
>
> U. S. Comp. Stats. Supp. 1907, page 393.

Such debts, it is clear, are not recoverable by indictment in the Courts referred to. They are recoverable only by civil action.

It is universal rule of statutory interpretation that, where a statute prescribes a particular mode of procedure for the enforcement of a penalty for an offence therein created, that mode of procedure must be followed. The word "may" in the statute is applicable to the parties who are permitted to maintain the civil action, any one of whom may so proceed.

> Wharton's Criminal Law, Vol. I., § 25.
> *U. S.* v. *Moore*, 11 Fed. 248–250.
> *U. S.* v. *Howard*, 17 Fed. 638–640.
> *U. S.* v. *Craft*, 43 Fed. 374.

We have, therefore, the case of an act described as a misdemeanor in which there is no provision whatsoever for punishment, except by a penalty to be recovered by civil action. There is no alternative punishment or procedure mentioned in this statute, nor is there any general statute providing for a penalty for misdemeanor.

It follows, therefore, that the provisions of the statute providing a civil process to enforce the penalties for violation of section 4 are exclusive, and no indictment will lie.

> *U. S.* v. *McElroy*, 115 Fed. 252, 253.
> *Moller* v. *U. S.*, 57 Fed. 490, 495.

Nor are there any common law offences against the United States.

U. S. v. *Britton*, 108 U. S. 199–206.

It may be contended that the language of section 5 does not prescribe the exclusive penalty for the reason that by its provisions the penalty "may" be sued for, and so that it is not obligatory upon the United States to adopt such a course to the exclusion of a recovery by indictment, but the answer is obvious. If the United States does not elect to follow the form prescribed by section 5, neither this statute nor any statute of the United States has fixed a penalty or procedure which can be applicable to the "misdemeanor" described in section 4.

It is obvious from the history of section 4 that Congress may have intended to change the character of the offence set forth by said section from the civil to the criminal side, for section 4 of the Immigration Act of March 3, 1903, characterizes the offence as "unlawful," and, in the present section, which is, in effect, a re-enactment of the Act of 1903, a change is made by substituting the words "a misdemeanor" for the word "unlawful," and it is submitted that the mere characterization of an act as a misdemeanor, without some accompaniment rendering such offence punishable by criminal process, cannot avail to alter the technical and true character of such offence, or create by implication an indictable crime.

The nature of the statute is essentially penal, and no loose construction is permissible. The forfeiture for the offence and the method by which such forfeiture may be secured to the United States are prescribed in the same section of the statute, and it is submitted that the procedure therein set forth must be followed.

Unless a criminal procedure is provided in terms, none such can be called to the assistance of an intent, however manifest it may be made to appear. A crime can be created only by express declaration of a statute. It cannot take form, through colorable suggestions of intent, nor can it rest upon implications, especially where such are in conflict with the express provision of the statute.

It is submitted, therefore, that the only penalty for a violation of section 4 is found in the civil action set forth by section 5, and that there was no error in the ruling of the Court to that effect.

Respectfully submitted,

HERBERT PARKER,

With him, CHARLES C. MILTON,
HENRY H. FULLER,
Counsel for Defendants in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 293.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS JOSEPH BELLAIRE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 14, 1909.

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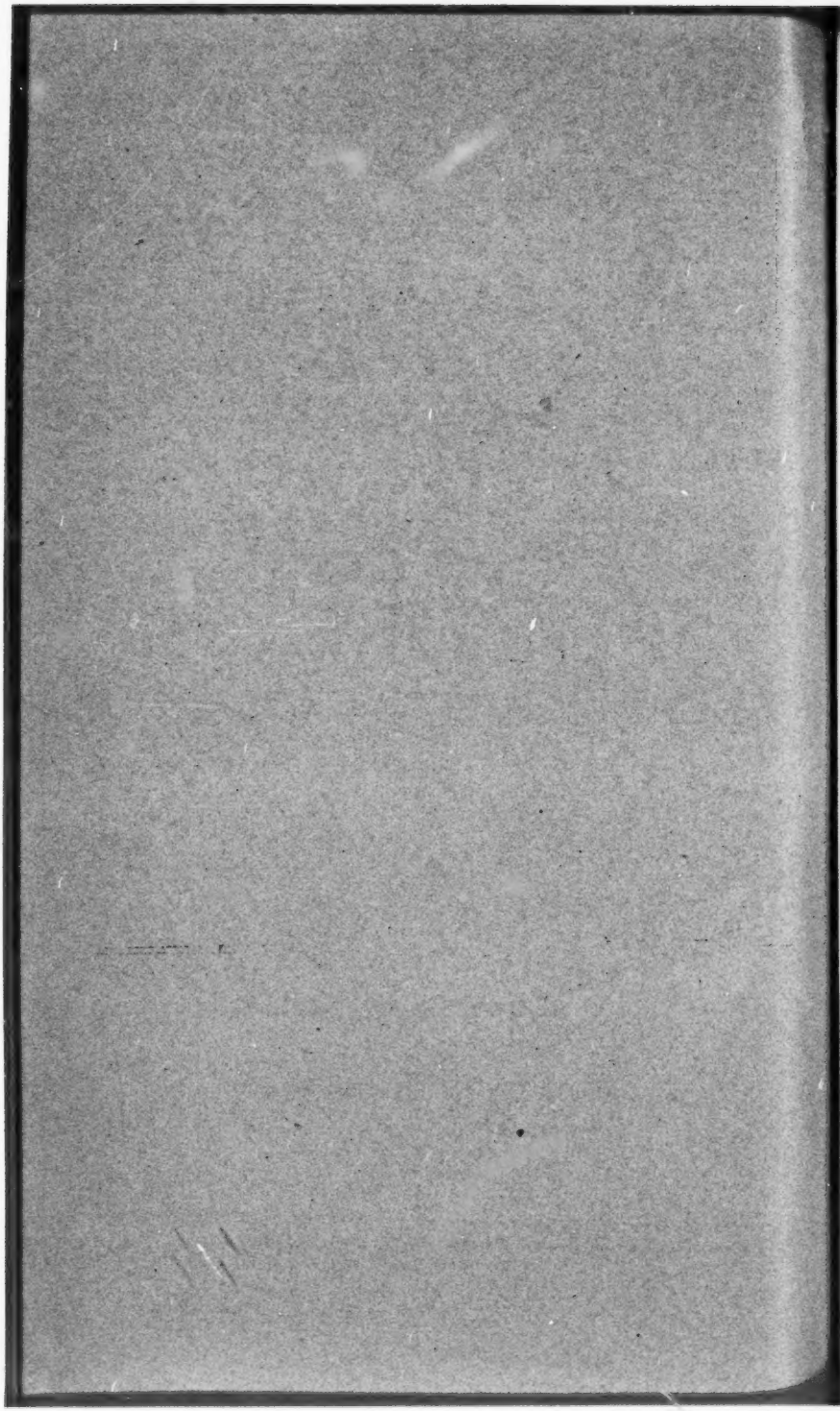

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 293.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS JOSEPH BELLAIRE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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a District Court of the United States, District of Massachusetts.

THE UNITED STATES OF AMERICA, BY INDICTMENT,
versus
TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS JOSEPH Bellaine. } No. 144.

WRIT OF ERROR.

ASA P. FRENCH, *United States Attorney.*
PARKER & MILTON,
HERBERT PARKER,
Attorneys for Defendants.

b *Writ of error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine (Criminal docket case No. 144), a manifest error hath happened, to the great damage of the said United States, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the sixteenth day of November next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of October, in the year of our Lord one thousand nine hundred and eight.

FRANK H. MASON,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

c *Return of District Court on writ of error.*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss.

And now here the judge of the District Court of the United States in and for the District of Massachusetts makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, true copies of the papers as by agreement of parties filed November 11, 1908, in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States at Washington, D. C., as within commanded.

In testimony whereof, I, Frank H. Mason, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twelfth day of November, A. D. 1908.

[SEAL.] FRANK H. MASON, *Clerk.*

1 THE UNITED STATES OF AMERICA.

At a district court of the United States of America for the District of Massachusetts, begun and holden at Boston, within and for said district, on the third Tuesday of March, in the year of our Lord one thousand nine hundred and eight:

The jurors for the United States of America within and for the District of Massachusetts, upon their oath, present that Tilden B. Stevenson and Amede Bellaire, otherwise known as Joseph Bellaine, both of Manchaug, in the District of Massachusetts, on the fifth day of July, in the year of our Lord one thousand nine hundred and seven, at said Manchaug, unlawfully did conspire together to commit an offence against the United States of America; that is to say, to bring into the United States certain alien contract laborers not then and there lawfully entitled to enter the United States, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque, and Rosina L'Eveque, who at the day and date of said offence were subjects of the King of Great Britain and Ireland, resident of the town of Riviere de Loup, in the Dominion of Canada, in pursuance of an offer theretofore made to the said alien contract laborers to perform unskilled labor within said United States, they, or either of them, the said alien contract laborers heretofore mentioned, not being then and there professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for a college or seminary, or persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants; all of which they, the said Stevenson and Bellaire, otherwise known as aforesaid, then and there well knew; that thereafter, to wit, on the twelfth day of July, in the year of our Lord one thousand nine hundred and seven, at said Riviere de Loup, in the Dominion of Canada, in pursuance of said unlawful conspiracy and to effect the object thereof, the said Amede Bellaire,

otherwise known as aforesaid, met the said alien contract laborers and from said Riviere de Loup accompanied said alien contract laborers into the United States of America, to wit, to Man-
2 chaug, in said District of Massachusetts, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America within and for the District of Massachusetts, upon their oath aforesaid, do further present that Tilden B. Stevenson and Amede Bellaire, otherwise known as Joseph Bellaine, both of Manchaug, in the District of Massachusetts, on the fifth day of July, in the year of our Lord one thousand nine hundred and seven, at said Manchaug, unlawfully did conspire together to commit an offence against the United States of America; that is to say, to assist to migrate into the United States certain alien contract laborers not then and there lawfully entitled to enter the United States, to wit, Magloire L'Eveque, Pierre L'Eveque, Marie L'Eveque, and Rosina L'Eveque, all of Riviere de Loup, in the Dominion of Canada, in pursuance of an offer to the said alien contract laborers made previous thereto by the said Amede Bellaire, otherwise known as aforesaid, to perform unskilled labor in the United States, they, the said alien contract laborers, or either of them, not being then and there professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for a college or seminary, or persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants; all of which they, the said Stevenson and Bellaire, otherwise known as aforesaid, then and there well knew; that thereafter, to wit, on the twelfth day of July, in the year of our Lord one thousand nine hundred and seven, at said Riviere de Loup, in the Dominion of Canada, in pursuance of said unlawful conspiracy and to effect the object thereof, the said Amede Bellaire, otherwise known as aforesaid, met the said alien contract laborers and from said Riviere de Loup accompanied said alien contract laborers into the United States of America, to wit, to Manchaug, in said District of Massachusetts, against the peace and dignity of the United States of America, and contrary to
3 the form of the statute in such case made and provided.

A true bill.

JAMES K. P. FRIEND,
Foreman of the Grand Jury.

ASA P. FRENCH,
United States Attorney for the
District of Massachusetts.

DISTRICT OF MASSACHUSETTS,
June 16, 1908.

Returned into the court by the grand jurors and filed.

FRANK H. MASON, *Clerk.*

4 *Demurrer of said defendants to indictment, filed July 13, 1908.*

United States of America. In the District Court for the District of Massachusetts.

UNITED STATES OF AMERICA
v.
TILDEN B. STEVENSON AND AMEDE BELLAIRE, otherwise known as Joseph Bellaine.

And now come said defendants and severally and jointly file and present this their demurrer to the said indictment and the several counts thereof filed in said cause.

And said defendants so assign as cause and grounds for said demurrer the following:

First. That neither count of said indictment sets forth any crime or offence against the United States formally and fully stated against either of said defendants, nor do either of said counts set forth any alleged crime or offence over which this honorable court has or can assume jurisdiction.

Second. That each count of said indictment assumes and purports to set forth and charge against said defendants two different and distinct crimes and offences against the United States in one and the same count in said indictment.

Third. That said indictment and the several counts thereof do not sufficiently, in form and substance, or plainly or formally set forth and allege any overt act done or committed by either of said defendants, within the jurisdiction of this court, to effect or consummate the object of the alleged conspiracy.

Fourth. That the said indictment, and the several counts thereof, do not, plainly or substantially, set forth or charge any crime or offence against the United States that can, as matter of law, be maintained or prosecuted upon an indictment, or within the
5 criminal jurisdiction or procedure of this honorable court.

Wherefore for want of sufficient and adequate allegations in said indictment, and the several counts thereof, and for want of jurisdiction of this court in the premises, the said defendants pray that the said indictment, and the several counts thereof, be quashed and annulled, and that said defendants be discharged thereon and therefrom, and that they be permitted to go hence without further answering to said indictment or either count thereof.

TILDEN B. STEVENSON.
AMEDE BELLAIRE.

By their attorneys:

PARKER & MILTON.
HERBERT PARKER.

I hereby certify that, in my opinion, the matters of law raised and presented by the foregoing demurrer are of such importance as to

be worthy of judicial inquiry, and that the said demurrer is not filed merely for the purpose of delay.

HERBERT PARKER.

6 District Court of the United States, District of Massachusetts.

THE UNITED STATES OF AMERICA, BY INDICTMENT,
versus
TILDEN B. STEVENSON AND AMEDE BELLAIRE, alias Joseph Bellaine. | No. 144.

Order of court, September 21, 1908.

DODGE, J. It is ordered that the demurrer filed by said defendants on July 13, 1908, be, and the same is hereby, overruled as to first count of the indictment and sustained as to second count of the indictment.

It is further ordered that the second count of said indictment be, and the same is hereby, quashed.

By the court:

FRANK H. MASON, *Clerk.*

7 *Bill of exceptions, filed October 19, 1908.*

District Court of the United States, District of Massachusetts.

UNITED STATES
v.
TILDEN B. STEVENSON ET AL. | No. 144.

Be it remembered that on the twenty-first day of September, A. D. 1908, the demurrer of the defendants, Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine, to the second count of the indictment in the above-entitled cause was sustained and said second count of said indictment quashed, and the United States duly excepted to the order of the court sustaining the demurrer to the said second count and quashing the said second count of said indictment, and its exceptions were allowed. A copy of the opinion of the court sustaining said demurrer is hereto annexed and made a part hereof, and the United States of America, by its attorney, Asa P. French, now presents this bill of exceptions to the court, and prays that the same may be signed by the court and allowed and made a part of the record in this cause.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

October 19, 1908.
Allowed:
FREDERIC DODGE,
Judge U. S. D. Ct. Mass.

8 (Copy.)

District Court of the United States, District of Massachusetts.

THE UNITED STATES OF AMERICA, BY INDICTMENT, *versus* TILDEN B. STEVENSON AND ANOTHER.	No. 144. Criminal docket. On demurrer to indictment.

Opinion (September 21, 1908).

DODGE, J. This indictment charges the two defendants named in it, under Rev. Stats., sec. 5440, with conspiring, on July 5, 1907, at Manchaug in this district, to commit violations of the immigration act of February 20, 1907 (34 Stats., 898). The first count charges a conspiracy to bring into the United States certain alien contract laborers not lawfully entitled to enter; the second, a conspiracy to assist said alien contract laborers to migrate into the country in pursuance of offers previously made to them to perform unskilled labor therein. The defendants demur to both counts.

The conspiracy charged in the first count is a conspiracy to violate sec. 8 of the act, which provides that any person who shall bring into the United States an alien not lawfully entitled to enter shall be deemed guilty of a misdemeanor and be punished by fine or imprisonment, or both. In U. S. vs. Burnison, a recent case in this court, I held on demurrer that a conspiracy to bring in such an alien was a conspiracy to violate sec. 8 of the immigration act of 1903, which section, for all purposes here material, is precisely similar in its provisions to sec. 8 of the present act; and that it was therefore a conspiracy to commit an offence against the United States. See the opinion in that case dated April 13, 1908. The same ruling must be made here. It is assumed in this case, as in U. S. vs. Burnison, that an alien who comes here in pursuance of a previous offer to perform unskilled labor in this country is a person not lawfully entitled
9 to enter the United States. (In re Ellis, 124 F. R., 637).

As an act done to effect the object of the conspiracy, the first count charges that one of the defendants "met the said alien contract laborers and from said Riviere du Loup (a town in Canada where they are alleged to have resided) accompanied (them) into the United States of America, to wit, to Manchaug." The defendants contend that this language does not describe any "overt act" such as Rev. Stats., sec. 5440, intends, because meeting or accompanying the aliens referred to in Canada would be acts not done within the United States, and because accompanying them after the border was crossed and while they were within the United States would of necessity include only acts done after the object of the conspiracy had been accomplished and the offence against the United States completed, but if the conspiracy was entered into within the United States and

within the jurisdiction of the court, the crime of the conspirators was then complete, and the subsequent overt act in pursuance of the conspiracy might have been done anywhere. (Dealy vs. U. S., 152 U. S., 539, 547.) Since it does not appear that meeting and accompanying the aliens as charged in the indictment could not possibly have tended to further the alleged conspiracy or to show it to be in existence or in operation, I must hold that the first count sufficiently alleges an "overt act." See the opinion of U. S. vs. Burnison above referred to. The demurrer is therefore overruled so far as the first count is concerned.

The second count charges conspiracy to violate sec. 4 of the act, which provides that "it shall be a misdemeanor" for any person to assist the migration of laborers such as the count describes into the United States. But although the terms of section 4 thus expressly describe a violation of its provisions as a misdemeanor, no fine or imprisonment is anywhere imposed for violating them, and the only liability incurred by doing what they forbid is the liability to a penalty established by section 5, according to which section the penalty is to be recovered by civil suit. In No. 143, U. S. vs. Stevenson et al. in this court, on demurrer to an indictment against these same defendants for violating section 4, I have this day sustained the demurrer on the ground that the civil action for a penalty provided for by sec. 5 is exclusive of any other proceeding and that no indictment will lie. "Offence" is of course a word often used in a sense broad enough to include any violation of a statutory prohibition, whether punishable criminally or incurring only a civil liability to a penalty. But as used in Rev. Stats., sec. 5440, I think it must be held to include only offenses punishable criminally. If the defendants are not indictable for violating sec. 4 of the immigration act, I think it must follow that they are not indictable for conspiring to violate it. (U. S. vs. Britton, 108 U. S., 199, 206; U. S. vs. Payne, 22 F. R., 426.) Under sec. 4 of the immigration act of 1903, which differed from sec. 4 of the present act in calling it "unlawful" instead of calling it "a misdemeanor" to do what both sections forbid, I held, in U. S. vs. Burnison, above referred to, that conspiring to do what the act called "unlawful" was not conspiring to commit an offence against the United States, because what the act had thus called unlawful it had not made punishable as a crime. I do not think a different conclusion is required merely because the present section uses the words "a misdemeanor" instead of the word "unlawful." There is no criminal punishment provided in the federal statutes for misdemeanors in general, and, though now called a misdemeanor, the forbidden act incurs as before a civil liability only. U. S. vs. Tsokas, decided March 27, 1908, in the Circuit Court for the Southern District of New York, is to the contrary; but as in no other case which I have seen has it been held that an indictment would lie under Rev. Stats. 5440, for a violation of law not punishable criminally, and with due respect for that decision, I

must decline to follow it. The question is one to which a strict rather than a liberal rule of construction seems to me applicable.

The demurrer is sustained as to the second count.

11 *Petition of the United States of America for a writ of error, filed October 19, 1908.*

District Court of the United States, District of Massachusetts.

UNITED STATES
vs.
TILDEN B. STEVENSON ET AL. } No. 144.

Now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings, and also in the rendition of a judgment in a plea between the petitioner and one Tilden B. Stevenson and one Amede Bellaire, alias Joseph Bellaine, which was heard upon demurrer to the indictment in said cause in the District Court of the United States for said district, at the September term, A. D. 1908, to wit, on the twenty-first day of September in said year, manifest error hath intervened, to the great damage of the petitioner, in that said court did, illegally and upon an improper construction of the statute of the United States upon which said indictment was founded, sustain the demurrer to the second count of said indictment, and did quash the said second count of said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

ASA P. FRENCH,
U. S. Attorney.

12 *Assignment of errors, filed October 19, 1908.*

And for errors committed by the court in sustaining said demurrer as to the second count of said indictment and quashing said second count of said indictment, the petitioners alleges as follows:

1. Said court erred in holding that the second count of said indictment did not well allege a violation by the defendants of section 5440 of the Revised Statutes of the United States; that is to say, a conspiracy to commit an offence prohibited by section 4 of the immigration act approved February 20, 1907;

2. Said court erred in holding that a conspiracy to commit a violation of said section 4 was not a conspiracy to commit a criminal offence against the United States.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

13 *Agreement as to return on writ of error, filed November 11, 1908.*

District Court of the United States, District of Massachusetts.

UNITED STATES OF AMERICA, BY INDICTMENT,
v.
TILDEN B. STEVENSON AND AMEDE BELLAIRE. } No. 144.

It is hereby agreed by and between the United States of America and the said Tilden B. Stevenson and Amede Bellaire that the return of the clerk of the said court on the writ of error in said above-named case shall comprise copies of the following papers, heretofore filed in said case in the office of said clerk of court, to wit:

Indictment;
Defendants' demurrer to said indictment;
Government's petition for writ of error;
Government's bill of exceptions;
Order of the court on said demurrer.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

TILDEN B. STEVENSON AND AMEDE BELLAIRE,
By PARKER & MILTON,
HERBERT PARKER, *Attorneys.*

14 *Citation on writ of error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine (criminal docket case No. 144), greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the sixteenth day of November next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Massachusetts, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Frederic Dodge, judge of the District Court of the United States for the District of Massachusetts, this

nineteenth day of October, in the year of our Lord one thousand nine hundred and eight.

FREDERIC DODGE,
U. S. District Judge.

15 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Due and sufficient service of the within writ is hereby accepted.

HERBERT PARKER,
Atty. for the within-named defendants in error.

16 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, Frank H. Mason, clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers named in the agreement as to return on writ of error filed on the eleventh day of November, A. D. 1908, in the cause entitled The United States of America, by indictment, versus Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaine, No. 144, in said district court depending, the petition of the United States for writ of error, the assignment of errors, and also the original citation on writ of error, issued in said cause, with the acknowledgment of service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston, in said district, this eleventh day of November, A. D. 1908.

[SEAL.] FRANK H. MASON, *Clerk.*

(Indorsement on cover:) File No. 21412. Massachusetts, D. C. U. S. Term No. 293. The United States, plaintiff in error, vs. Tilden B. Stevenson and Amede Bellaire, alias Joseph Bellaire. Filed November 14th, 1908. File No. 21412.

Office Supreme Court, U. S.
FILED
OCT 7 1909
JAMES H. McKENNEY,
Clerk.

No. 293.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

TILDEN B. STEVENSON AND AMEDE BELLAIRE, ALIAS JOSEPH BELLAIRE, DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

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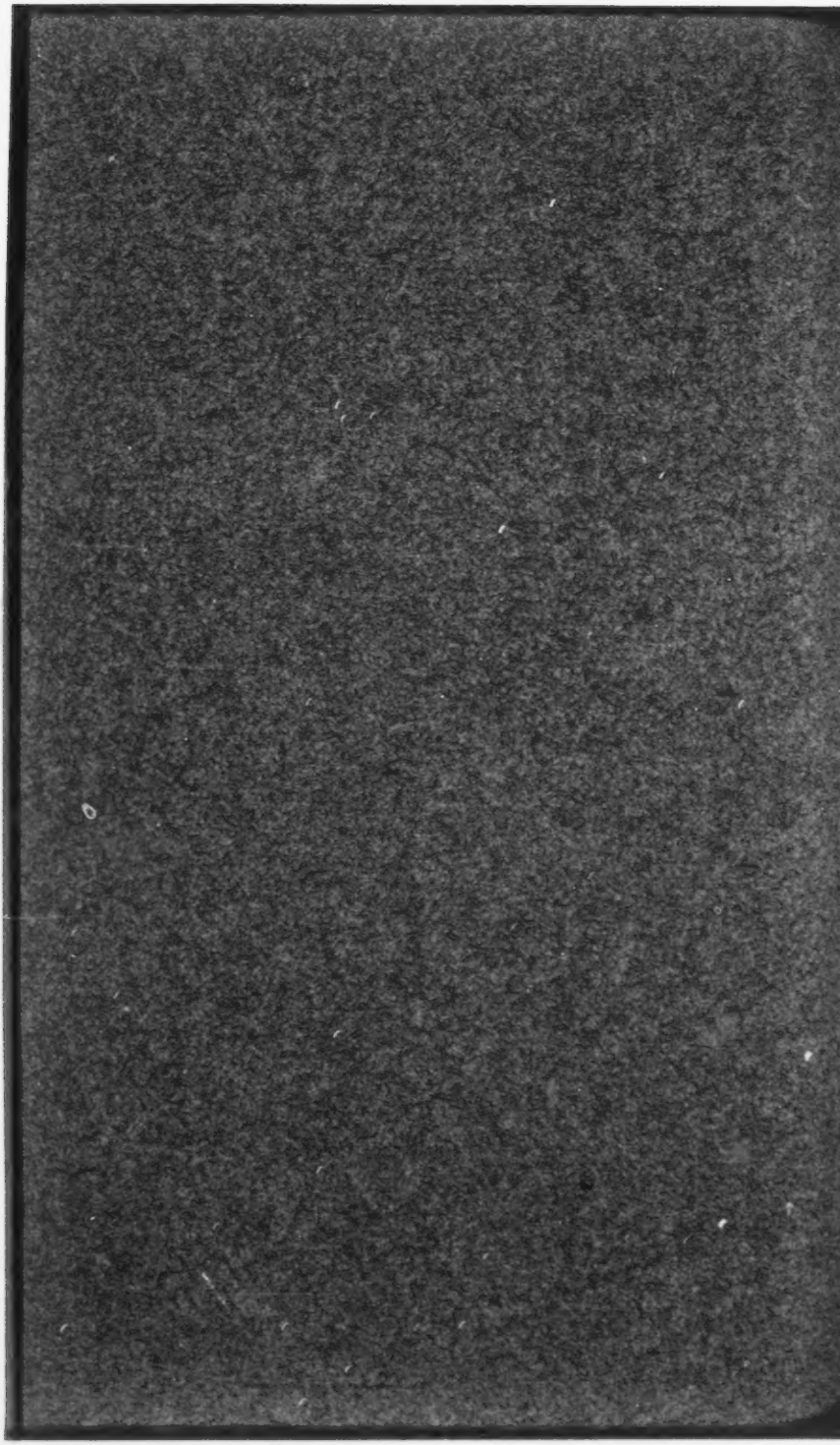

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
TILDEN B. STEVENSON AND AMEDE BELLAIRE, alias Joseph Bellaire, defendants in error. } No. 293.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

The writ of error in this case runs directly to the United States District Court for the District of Massachusetts under the criminal appeals act (34 Stat., 1246), review being sought here of the action of the District Court in sustaining a demurrer to the second count of the indictment against defendants. The first count of the indictment was upheld by the District Court, but the second count, charging a conspiracy under Revised Statutes, section 5440, to violate section 4 of the immigration act of February 20, 1907 (34 Stat., 898–900), was quashed on the

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ground that assisting alien contract laborers to migrate into the United States in violation of section 4 of said immigration act is not "an offense against the United States" of the kind which Revised Statutes, section 5440, properly construed, punishes a conspiracy to commit. (Rec., 7.)

Defendants in this case are defendants also in case No. 292, presented at the same time, and the discussion of Point II in the brief in case No. 292 will be pertinent in this case.

For convenience, sections 4 and 5 of the immigration act of 1907 are reprinted here.

> SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.
>
> SEC. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name

> and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

Section 5440 of the Revised Statutes reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

ASSIGNMENT OF ERRORS.

I. The District Court erred in holding that the second count of the indictment did not well allege a violation by the defendants of section 5440 of the Revised Statutes of the United States; that is to say, a conspiracy to commit an offense prohibited by section 4 of the immigration act approved February 20, 1907. (Rec., 8.)

II. Said District Court erred in holding that a conspiracy to commit a violation of said section 4 of the

immigration act of 1907 is not a conspiracy to commit a criminal offense against the United States. (Rec., 8.)

ARGUMENT.

I.

The offense under section 4 of the immigration act of 1907 may be prosecuted by indictment or information. It therefore not only is a crime, but also is subject to criminal prosecution; and personal punishment is visited upon the offender. No doubt can remain, when all these elements are present, of the applicability of Revised Statutes, section 5440, to a conspiracy to commit such offence.

The right of the Government to prosecute by indictment for violation of section 4 of the immigration act is argued in the brief for the United States in case No. 292, under Point II, and that argument need not be repeated here.

II.

Even if indictment will not lie for a violation of section 4 of the immigration act of 1907, Congress has made that offense an express misdemeanor; and such statutory classification of the crime brings a conspiracy to commit it unmistakably within Revised Statutes, section 5440.

1. The legislative declaration that a violation of section 4 shall be a misdemeanor was first made in the immigration act of 1907, the language of the act of 1903 having been merely that it should be "unlawful" to do what is now pronounced a misdemeanor. Sections 4 and 5 of the act of 1907 are quoted in the preliminary statement of this brief, and those sec-

tions of the act of 1903 are quoted on page 26 of the brief in case No. 292, submitted herewith. As shown in that brief, the purpose of Congress in declaring the offense under section 4 a misdemeanor must have been either—

(1) To make indictment clearly available; or

(2) To bring the offense clearly within the meaning and scope of Revised Statutes, section 5440; or

(3) To do both those things.

If Congress entertained the first purpose, it must equally have had the second purpose, for the result of the first would be to accomplish the second purpose. If Congress did not have the first purpose, it still must have had the second purpose, viz, to bring the offense under section 4 indisputably within the scope of Revised Statutes, section 5440; because no other reason for the deliberate denouncement of the offense under section 4 as a misdemeanor can be found.

The kind or amount of penalty for the offense under section 4 was not altered in 1907. The explicit denunciation of the crime as a misdemeanor was not incident to any other change of statute, but was made for its own sake. It must therefore have been intended by Congress to affix the ordinary and full consequences that attach to the commission of misdemeanors generally; and those consequences certainly include the result that a conspiracy to commit the misdemeanor is within section 5440.

If this misdemeanor is not within section 5440, why is any other?

2. A misdemeanor of course is a crime.

Commonwealth of Kentucky v. *Dennison*, 24 How., 66, 99.

3. A prohibited act or omission may even be a crime, when a statute denounces it as such, though the criminal is a corporation which can not be punished because the statute imposes no other punishment than imprisonment; and therefore persons who aid and abet the corporation to commit that crime may themselves be punished. If this be true, *a fortiori* a crime which is punishable is not removed from the category of offenses against the United States within section 5440 merely because the prosecution for that crime must be by civil action.

In *United States* v. *Van Schaick* (134 Fed., 592) the Knickerbocker Steamboat Company, a corporation, was indicted as owner of a certain steamboat for violating section 5344, Revised Statutes, which reads:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.

Other defendants were indicted for aiding and abetting the corporation in its violation of that section. The Circuit Court held that the mere fact that Congress had provided no punishment for violation of the law by a corporation did not show the offense not to be a crime when committed by a corporation, saying:

> The corporation was the owner. It violated its duty, and fell within the terms of the statute. But it is urged that it can not be convicted under the statute. The statute makes the owner's "fraud, misconduct, connivance, or violation of law," causing death, an offense. In this case the duty of supplying proper life-preservers is commanded by the law. This affirmative command involves another command—that life-preservers not in compliance with the law shall not be furnished. The corporation navigated without them, and caused death thereby. It is not necessary to show intention to kill, nor malice in fact.
>
> But it is said that no punishment can follow conviction. This is an oversight in the statute. is it to be concluded, simply because the given punishment can not be enforced, that Congress intended to allow corporate carriers by sea to kill their passengers through misconduct that would be a punishable offense if done by a natural person? A corporation can be guilty of causing death by its wrongful act. It can with equal propriety be punished in a civil or criminal action. It seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the

> offense, when committed by a corporation, than that it intended to give the owner impunity simply because it happened to be a corporation.
>
> But it is urged that the officers could not aid or abet the corporation in its misconduct. The fact is that the corporation could not be guilty of misconduct, except as some of its officers or employés not only aided and abetted, but also did the act or failed to act. * * * The indictments in the present case sufficiently charge both procurement to neglect doing a commanded act, and to do that which is a direct violation of the commanded act (pp. 602–604).

The same principle was applied in *Cohen* v. *United States* (157 Fed., 651). Defendants were indicted for conspiring that a certain bankrupt corporation should conceal its assets, in violation of subdivision B of section 29 of the bankrupt act of July 1, 1898 (30 Stat., 554), which reads as follows:

> A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy.

The Circuit Court of Appeals held that, although the only punishment was imprisonment, the forbidden act was nevertheless a crime on the part of the corporation; and that accordingly a conspiracy

to commit this crime was within section 5440. Judge Noyes said in this connection:

> These propositions show the sufficiency of this charge: (1) The corporation—the bankrupt—could violate the provision against fraudulently concealing its assets. Its act would be criminal notwithstanding its corporate character would prevent its punishment. (See *United States* v. *Van Schaick* (C. C.), 134 Fed., 592.) (2) Even if the corporation alone could violate the bankruptcy act, the defendants could conspire that the corporation should violate it, and so be guilty of conspiracy (p. 653).

4. On the very question here involved, a conclusion opposite to the view taken by the court below in the present case was reached in *United States* v. *Tsokas* (163 Fed., 129).

III.

It is enough in any case to make an "offense against the United States" within the meaning of Revised Statutes, section 5440, that the offense which the conspiracy contemplates is a crime, in the fundamental sense of a prohibited public wrong, visited with personal punishment. Neither the mode of prosecution nor the severity of the punishment for the offense is material.

1. Section 5440 does not limit itself to conspiracy to commit a felony, or even a misdemeanor. It reaches to a conspiracy for any and every public, or criminal, offense against the United States. Treason at the higher end of the series of crimes is within the section; and if there be any crime that is

lower than a misdemeanor, that lowest crime is within the section. No line is drawn by the statute for separating what is included from what is excluded except the line between what is and what is not crime. Degree of criminality is not regarded.

"Offense," the word employed in section 5440, is as wide as could be used. No public wrong can be suggested that it will not cover.

Illustrations of the comprehensiveness of this word "offense" are abundant in the Constitution and the statutes. Thus:

Article I, section 8, of the Constitution, in its tenth clause, authorizes Congress to define and punish "offenses against the law of nations."

Article II, section 2, of the Constitution says that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Article V of the amendments to the Constitution declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Revised Statutes, section 1022, says that "all crimes and offenses committed against the provisions of Chapter VII, title 'Crimes,' which are not infamous may be prosecuted either by indictment or by information filed by a district attorney."

Section 343 of the Criminal Code of the United States (act of March 4, 1909; 35 Stat., 1088, 1159), taking effect January 1, 1910, says that "all offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any

law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed."

Is the word "offense" of narrower scope in section 5440 than in the preceding illustrative provisions?

This court has said that "an offense in its legal signification means the transgression of a law."

Moore v. *People of Illinois*, 14 How., 13, 19.

In the present connection this definition should be restricted to a transgression of public law; but no other qualification is needed.

2. The immigration act itself speaks of a violation of section 4 as an "offense" (sec. 5). It says that the violator "shall forfeit and pay for every such offense" $1,000. There is no propriety in taking the same word in section 5440 as not denouncing the very violation of public law which the statute forbidding the act itself calls an offense.

3. The criminal character of the act forbidden by section 4 is unquestioned.

The prohibition against the introduction of alien contract laborers is for the protection and benefit of the public at large; not of individual members of the community. The right which is invaded by the offense is wholly public.

This court has established the criminal character of the particular offense.

Lees v. *United States*, 150 U. S., 476.

The decision in that case was that even in a civil action for violation of section 4 the defendant can not be required to be a witness against himself, because of the criminal nature of the charge against him.

To a like point is *Boyd* v. *United States* (116 U. S., 616).

4. Nothing against the application of section 5440 in the present case is found in *United States* v. *Britton* (108 U. S., 199).

The offense which it was sought to bring within section 5440 in that case was a violation of Revised Statutes, section 5204, prohibiting payment of dividend by a national bank out of capital or otherwise than from its net profits on hand. A violation of such section 5204 was held, however, not to be an offense against the United States; and these observations explain the case:

(1) The wrong charged was not a crime at all, but merely a violation of private right, viz, the right of the stockholders and creditors of the bank to have the capital maintained.

(2) The supposed offense was not punishable in any criminal way. Not even a penalty was affixed by the statute.

(3) Even if the charter of the bank could be forfeited for the misuser of its powers, that would not be a punishment of the directors themselves; and, as to the bank itself, the forfeiture of the charter would be only a rescission of the charter contract with the State for breach of that contract.

Mr. Justice Woods said:

> It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution (p. 206).

The decision would have been different if the statute had made the wrongful act a crime, either by declaring it to be a misdemeanor or by other manifestation of a purpose to make it a public wrong.

So far as any liability might rest upon the directors for their declaration of an improper dividend in *United States* v. *Britton*, the civil rather than criminal nature of that liability and of the wrong creating the liability is shown by *Huntington* v. *Attrill* (146 U. S., 657).

That case is well explained by the following quotation:

> The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate

debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it can not be enforced in a foreign state or country (pp. 676–677).

5. As to the form of proceeding by which a violation of section 4 is to be prosecuted, it is enough to say that section 5440 looks solely to the nature of the act which the conspiracy contemplates, and not to the nature of the remedy given for that act. Section 5440 does not name a conspiracy to commit "an indictable offense" or "an offense for which information lies;" nor does section 5440 say anything whatever concerning the mere remedy. It is enough that the object of the conspiracy is an act criminal in its own quality.

Mr. Justice Field said in *United States* v. *Chouteau* (102 U. S., 603):

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution (p. 611).

In holding that this court has not original jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or corporation of another State for a criminal penalty this court said:

> The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin

without having deposited with the proper officer of the State a full statement of its property and business during the previous year. (Wisconsin Rev. Stat., sec. 1920.) The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. (Wisconsin Stat. 1885, c. 395.) *The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.* (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S., 265, 299.)

6. Likewise, the operation of section 5440 does not depend upon the amount or extent of punishment imposed for the "offense against the United States." Death, imprisonment in penitentiary or jail for a longer or shorter time, fine large or small, forfeiture of all or some property—each suffices, if the wrongful act is public in nature and therefore a crime.

This is settled by this court in *Clune* v. *United States* (159 U. S., 590).

It was there said:

> At the argument in this court other counsel than those whose names are on the brief appeared, and in addition presented this further objection: By section 3995, Rev. Stat., the offence of obstructing the passage of the mails is made punishable by a fine of not more than $100. Under section 5440, Rev. Stat., a conspiracy to commit any offence against the United States is punishable by a fine of not less than $1,000 nor more than $10,000, and by imprisonment for not more than two years. Upon this he contended that a conspiracy to commit an offence can not be punished more severely than the offence itself, and also that when the principal offence is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain and not open to doubt. A conspiracy to commit an offence is denounced as itself a separate offence, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. (*Callan* v. *Wilson*, 127 U. S., 540, 555.) The power

> exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each (pp. 594–595).

If a mere money penalty, $100, for the offense is enough, a penalty of $1,000 must suffice to show an offense of sufficient nature to warrant indictment for the conspiracy.

For important cases of conspiracy under section 5440 to commit offenses under the statutes regulating railroads, where only a money penalty attached to the offense, see—

Thomas v. *United States*, 156 Fed., 897.
United States v. *Clark*, 164 Fed., 75.

LLOYD W. BOWERS,
Solicitor-General.

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UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 293.

THE UNITED STATES, PLAINTIFF IN ERROR

v.

TILDEN B. STEVENSON, AMEDE BELLAIRE, *alias* JOSEPH BELLAIRE.

BRIEF FOR THE DEFENDANTS IN ERROR.

INTRODUCTION.

This is an indictment in the District Court of Massachusetts, charging in the first count thereof that the defendants conspired to bring into the United States certain alien contract laborers not lawfully entitled to enter (Record, pp. 2–3).

The second count of such indictment charges that the defendants conspired to assist such alien contract laborers to migrate into the United States, in pursuance of offers previously made to them to perform unskilled labor therein (Record, p. 3).

To this indictment the defendants jointly and severally demurred on the ground, among others, that the indictment, and each count thereof, did not, plainly or substantially, set forth or charge any crime or offence against the United States that could, as matter of law, be maintained, or prosecuted upon an indictment, or within the criminal jurisdiction of the Court (Record, p. 4).

The Court overruled the demurrer as to the first count of the indictment, and sustained the same as to the second count, and thereupon the Government duly excepted to the ruling sustaining such demurrer, and thereupon a petition for a writ of error was filed to this Court in which the Government makes the following assignments of error.

1. Said Court erred in holding that the second count of said indictment did not well allege a violation by the defendants of section 5440 of the Revised Statutes of the United States; that is to say, a con-

spiracy to commit an offence prohibited by section 4 of the Immigration Act, approved February 20, 1907.

2. Said Court erred in holding that a conspiracy to commit a violation of said section 4 was not a conspiracy to commit a criminal offence against the United States.

The opinion of the Court sustaining the demurrer to the second count is found on pages 6 and 7 of the Record.

BRIEF.

THE DEMURRER TO THE SECOND COUNT OF THE INDICTMENT WAS PROPERLY SUSTAINED.

1. Both assignments of error relate to the second count of the indictment, and may be considered together in the determination of the question whether section 4 of the Immigration Act sets forth such an offence against the United States as will support an indictment for conspiracy under section 5440 of the Revised Statutes.

It has been held that an offence against the United States which may be the basis for an indictment for conspiracy under section 5440 must be such an offence as will itself support an indictment.

U. S. v. *Britton*, 108 U. S. 199.
U. S. v. *Watson*, 17 Fed. 145–148.
U. S. v. *Payne*, 22 Fed. 426, 427.

The Court in sustaining the demurrer recites that a different conclusion has been reached in the Circuit Court of the Southern District of New York, in

U. S. v. *Tsokas*, 163 Fed. 129,

but it is submitted that an inspection of that decision will show that, while the learned justice there has concurred in the decision of the District Court in case at bar, to the effect that, although section 4 of the Immigration Act of 1907 has attempted to define a crime, there has been provided no punishment for such offence within the language of the act itself, other than the penalty recoverable by a judgment in a civil suit, yet the Court in

U. S. v. *Tsokas*, supra at 131,

has decided that this is not fatal in determining the criminal nature of the offence, and has cited

U. S. v. *Van Schaick*, 134 Fed. 602,
U. S. v. *Kellam*, 7 Fed. 843,

to support his finding, but it is submitted that these cases are not authority for the proposition. In

U. S. v. *Van Schaick*, supra,

a criminal penalty was provided by the statute there in question, but could not be enforced against the particular defendant corporation, sought to be held. While in

U. S. v. *Kellam*, supra at 845,

the statute under consideration prescribed imprisonment in the event that the penalty therein set forth was not paid.

The principles set forth and discussed in

U. S. v. *Watson*, supra, and
U. S. v. *Britton*, supra,

do not appear to have been considered by the learned Court in reaching his decision in *U. S.* v. *Tsokas*, supra.

It is submitted, therefore, that upon determination of the case of

U. S. v. *Stevenson et al.*, No. 292,

now before this Court, must rest the decision of the case at bar, and, if it shall be held that section 4 of the Immigration Act of 1907 sets forth no offence for which an indictment will lie, then the decision of the learned justice, sustaining the demurrer to the second count of the present indictment, must be sustained, and the assignments of error set forth in the case at bar must be held untenable.

Respectfully submitted,

HERBERT PARKER,

With him, CHARLES C. MILTON,
HENRY H. FULLER,
Counsel for the Defendants in Error.

UNITED STATES *v.* STEVENSON

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 292. Argued October 14, 15, 1909.—Decided November 29, 1909.

On writ of error taken by the United States under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, where the indictment was dismissed as not sustained by the statute and also as bad on principles of general law, this court can only review the decision so far as it is based on the invalidity or construction of the statute; it cannot consider questions of general law. *United States* v. *Keitel*, 211 U. S. 370.

In determining whether a special remedy created by a statute for enforcing a prescribed penalty excludes all other remedies, the intention of Congress may be found in the history of the legislation, and, in the absence of clear and specific language, Congress will not be presumed to have excluded the Government from a well-recognized method of enforcing its statutes.

The fact that a penal statute provides for enforcing the prescribed penalty of fine and forfeiture by civil suit does not necessarily exclude enforcing by indictment; and so held in regard to penalty for assisting the immigration of contract laborers prescribed by §§ 4 and 5 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898.

Although the term misdemeanor has at times been used in the statutes

of the United States without strict regard to its common-law meaning a misdemeanor at all times, has been a crime, and a change in a statute by which that which before was merely unlawful is made a misdemeanor will not be presumed to be meaningless.

When the Government prosecutes by indictment for a penalty that it might sue for in a civil action the person proceeded against is entitled to all constitutional protection as to production of witnesses against him and a verdict cannot be directed against him as might be the case in a civil action.

THE facts are stated in the opinion.

The *Solicitor General* for the United States:

On the construction of the statute: This court has jurisdiction to review the action of the District Court in sustaining the demurrer to the second count of the indictment, which charged defendants with assisting contract laborers to migrate from Canada into the United States in violation of § 4 of the Immigration Act.

The Criminal Appeals Act, in allowing immediate appeal when the particular questions of law enumerated in the act have been decided against the Government, intends unquestionably to rid the Government of the obstruction of criminal justice through mistakes of the inferior courts on such questions of law. There is nothing in this act which forbids the idea that in such case as the present the Government can have a review by this court, either of the question of statutory construction alone, or of both that question and the other question on which the lower court rested its judgment; nor does the act limit this court's consideration to the single question which gives the right of appeal.

In cases where the question which gives the right of appeal requires determination, but the actual decision of another point by the lower court equally led to the judgment below—so that this court's decision of the question which gives the right of appeal must be supplemented by decision of the other question by the lower court in order to ascertain what conse-

quences upon the judgment below this court must attach to its own decision of the question which gives the right of appeal—each question made by the lower court a basis of its judgment is involved in the appeal. Under the circumstances of this case, the court ought to pass upon both questions actually decided below.

When this court finds the lower court right upon the point which made direct appeal to this court allowable, it can at once affirm the judgment of the lower court without considering any other question raised or decided in the lower court. *United States* v. *McDonald*, 207 U. S. 120; *United States* v. *Mason*, 213 U. S. 120. And when this court finds the lower court wrong upon the point which made appeal allowable, it can at once reverse the judgment of the lower court without considering any other questions raised in the lower court but not actually decided by it. *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Keitel*, 211 U. S. 370.

Indictment is an allowable mode of prosecution for violating § 4 of the Immigration Act of 1907; and the action of debt allowed by § 5 is not exclusive. The wording of § 5 as to action of debt is merely permissive and does not prohibit indictment; and no intention to deny the Government the ordinary remedies of indictment or information for prosecution for a penalty will be inferred. *Savings Bank* v. *United States*, 19 Wall. 227, 238, 239; *Crofton's Case*, 1 Mod. 34; *United States* v. *Stocking*, 87 Fed. Rep. 857.

Either indictment or information will lie under a statute creating an offense punishable by penalty and which prescribes no remedy or allows some special remedy not intended to be exclusive; because they are ordinary and approved methods of prosecution for an offense not above a misdemeanor.

As to indictment: 2 Hawk. P. C., ch. 25, § 4; 1 Chitty Crim. Law (Am. Ed., 1847), *162; Harris's Crim. Law (London, 101), p. 333; *United States* v. *Chouteau*, 102 U. S. 603, 610.

As to information: 2 Hawk. P. C., ch. 26, §§ 1, 2; 1 Chitty's Crim. Law, *844, 845; 4 Bl. Com. 309, 310; Harris's Crim.

Law, p. 343; *United States* v. *Buzzo*, 18 Wall. 125; *Ex parte Wilson*, 114 U. S. 417, 424, 425.

Mr. Herbert Parker, *Mr. Charles C. Milton* and *Mr. Henry H. Fuller*, for defendants in error, submitted:

On the construction of the statute: A violation of § 4 of the Immigration Act cannot be prosecuted by indictment. While made a misdemeanor no penalty is prescribed in this section, and the next section provides for recovery of a money penalty by suit. This constitutes a debt which is recoverable only by civil action.

It is a universal rule of statutory interpretation that, where a statute prescribes a particular mode of procedure for the enforcement of a penalty for an offense therein created, that mode of procedure must be followed. The word "may" in the statute is applicable to the parties who are permitted to maintain the civil action, any one of whom may so proceed. 1 Wharton's Crim. Law, § 25; *United States* v. *Moore*, 11 Fed. Rep. 248; *United States* v. *Howard*, 17 Fed. Rep. 638; *United States* v. *Craft*, 43 Fed. Rep. 374.

We have, therefore, the case of an act described as a misdemeanor in which there is no provision whatsoever for punishment, except by a penalty to be recovered by civil action. There is no alternative punishment or procedure mentioned in this statute, nor is there any general statute providing for a penalty for misdemeanor.

It follows, therefore, that the provisions of the statute providing a civil process to enforce the penalties for violation of § 4 are exclusive, and no indictment will lie. *United States* v. *McElroy*, 115 Fed. Rep. 252; *Moller* v. *United States*, 57 Fed. Rep. 490, 495.

It is obvious from the history of § 4 that Congress may have intended to change the character of the offense set forth by said section from the civil to the criminal side, for § 4 of the Immigration Act of March 3, 1903, characterizes the offense as "unlawful," and, in the present section, which is, in effect, a

reënactment of the act of 1903, a change is made by substituting the words "a misdemeanor" for the word "unlawful," and it is submitted that the mere characterization of an act as a misdemeanor, without some accompaniment rendering such offense punishable by criminal process, cannot avail to alter the technical and true character of such offense, or create by implication an indictable crime.

The nature of the statute is essentially penal, and no loose construction is permissible. The forfeiture for the offense and the method by which such forfeiture may be secured to the United States are prescribed in the same section of the statute, and it is submitted that the procedure therein set forth must be followed.

Unless a criminal procedure is provided in terms, none such can be called to the assistance of an intent, however manifest it may be made to appear. A crime can be created only by express declaration of a statute. It cannot take form, through colorable suggestions of intent, nor can it rest upon implications, especially where such are in conflict with the express provision of the statute.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes to this court under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error on behalf of the United States in certain criminal cases. The defendants in error were indicted for the violation of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, and charged with unlawfully assisting certain alien contract laborers to migrate from Canada to the United States, in violation of the statute. The District Court, upon demurrer to the indictment, held the second count thereof to be invalid, because the sole remedy for a violation of the statute was in a civil action for the recovery of a penalty under § 5 of the act. The court also held the second count bad because it did not sufficiently specify the acts of assistance constituting

the alleged offense. Rulings were made concerning the first count not involved in this proceeding.

From this statement it is apparent that the court below proceeded upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law. We are therefore met at the threshold of the case with the question whether a writ of error will lie in such a case as the one under consideration, under the provisions of the Criminal Appeals Act of 1907.

This statute was before the court in the case of *United States* v. *Keitel*, 211 U. S. 370, and is given in full in the margin of the report of that case. In that case it was held that the purpose of the statute being to permit a review in this court of decisions based upon the invalidity or construction of the criminal statutes of the United States, the decisions of the lower courts were intended to be reviewed only upon such questions, and the whole case could not be brought here for review. In the *Keitel case* it was insisted that this court should consider the validity of the indictment upon questions of general law not decided in the court below. We are here confronted with a case in which a decision of the court below sustaining a demurrer to an indictment involves not only the construction of a Federal statute, but another ground upon which the decision was also rested, which involves the sufficiency of the indictment on general principles.

The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the Government, in order to have a

final and determinative construction of the act and to prevent a miscarriage of justice if the construction of the statute in the court below was unwarranted.

In the *Keitel case* this court said (211 U. S. 398):

"That act [of March 2, 1907], we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides."

As the question of general law involved in the decision of the court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error.

We come now to consider the construction of the statute and the validity of the indictment in that respect. Sections 4 and 5 of the Immigration Act under consideration are given in the margin.[1]

[1] SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

SEC. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

A reading of these sections makes it apparent that the act makes it a misdemeanor to assist or encourage the importation of contract laborers, and that violations thereof may be punished with forfeiture and payment of $1,000 for each offense, which, it is provided, may be sued for and recovered by the United States, or by any person bringing the action, as debts of like amounts are recovered in the courts of the United States; and it is made the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that where a statute creates a right and prescribes a particular remedy that remedy, and none other, can be resorted to. An illustration of this doctrine is found in *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, in which it was held that in the copyright statutes then in force Congress had provided a system of rights and remedies complete and exclusive in their character. This was held because, after a review of the history of the legislation, such, it was concluded, was the intention of Congress.

The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect. *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238, 239. In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy intended to take from the Government the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie, and the court below was correct in its conclusion.

It is undoubtedly true that a penalty of this character, in the absence of statutory provisions to the contrary, may be enforced by criminal proceedings under an indictment. The doctrine was stated as early as *Adams* v. *Woods*, 2 Cranch, 336, 340, wherein Mr. Chief Justice Marshall said:

"Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information. . . . In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie."

In *Lees* v. *United States*, 150 U. S. 476, 479, the doctrine was laid down that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action for debt. It is to be noted that this statute (§ 5 of the Immigration Act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the Government to this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the Government the well-recognized method of enforcing such a statute by indictment and criminal proceedings.

When we look to the history of the act we think it becomes manifest that Congress did not so intend. The Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, was amended by the act of February 20, 1907, c. 1134, 34 Stat. 898, now under consideration. The original act made it unlawful to assist or encourage the importation or migration of certain aliens into the United States. The amended act declares that such assistance, etc., shall be a misdemeanor. It is not to be presumed that this change is meaningless, and that Congress had no purpose in making it. Nor can we perceive any purpose in making the change except to manifest the intention of Con-

gress to make it clear that the acts denounced should constitute a crime which would carry with it the right of the Government to prosecute as for a crime. This term "misdemeanor" has been generally understood to mean the lower grade of criminal offense as distinguished from a felony. It is true that the term has often been used in the statutes of the United States without strict regard to its common-law meaning, and sometimes to describe offenses of a high grade, which have been declared in the statutes to be misdemeanors. In the statutes of the States the term has generally been defined as embracing crimes not punishable by death or imprisonment in the penitentiary. And we may note that the new penal code of the United States which will go into effect on January 1, 1910 (§ 335, c. 321, 35 Stat. 1088), provides that all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be termed felonies; all other offenses shall be termed misdemeanors. But at all times a misdemeanor has been a crime. *Commonwealth of Kentucky* v. *Dennison*, 24 How. 66, 69.

Congress having declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the Government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. *Hepner* v. *United States*, 213 U. S. 103.

We therefore reach the conclusion that the court erred in sustaining the demurrer to the second count of the indictment, so far as that ruling is based upon the construction of the statute in question. The judgment is reversed and the case